TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 540

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

E. V. KUYKENDALL, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED SEPTEMBER 10, 1923

(29,850)

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[fol. 1] NAMES AND ADDRESSES OF SOLICITORS

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Dunbar, John H., Attorney General of the State of Washington, Olympia, Washington; Clifford, Raymond W., Assistant Attorney General of the State of Washington, Olympia, Washington, Solicitors for Appellees.

[fol. 1½] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity. No. 166E

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

E. V. KUYKENDALL, as Director of Public Works of Washington; Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the Persons Constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney-General of the State of Washington, Defendants.

BILL OF COMPLAINT—Filed Apr. 24, 1923

To the Judges of the District Court of the United States for the Western District of Washington, Southern Division:

The Pacific Telephone and Telegraph Company, a corporation organized and existing under the laws of the State of California, brings this, its bill of complaint, against the defendants, and thereupon complains and charges as follows:

[fol. 2] I. That it is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its

principal place of business at San Francisco, in said state, and is a citizen of said state. That during all of the times referred to in this bill of complaint it has owned and operated and now owns and operates a telephone and telegraph system and has been and is now engaged in operating and conducting a public telephone and telegraph system in the State of Washington and elsewhere. That it has complied with all the laws of the State of Washington relating to foreign corporations, has paid its annual license fee last past due, and is duly authorized to do business therein.

II. That the defendant E. V. Kuykendall is the duly appointed, qualified and acting Director of Public Works of Washington, and is a citizen and resident of the Eastern District of Washington; that the defendant Hance H. Cleland is the duly appointed, qualified and acting Supervisor of Public Utilities of said state, and is a citizen and resident of the Eastern District of Washington; that the defendant [fol. 3] Frank R. Spinning is the duly appointed, qualified and acting Supervisor of Transportation in said state and is a citizen and resident of the Western District of Washington. That said E. V. Kuykendall, Hance H. Cleland and Frank R. Spinning are the members of and constitute the Department of Public Works of the State of Washington. Said defendants will be hereinafter referred to as the Department. That the defendant John H. Dunbar is the duly appointed, qualified and acting Attorney-General of the State of Washington, and is a citizen and resident of the Western District of Washington.

III. This suit is of a civil nature in equity, is a controversy between citizens of different states and arises under the constitution and laws of the United States in that plaintiff seeks to enjoin the enforcement of an order made by the said Department of Public Works on March 31, 1923, which said order prescribes the maximum rates and charges to be charged by plaintiff for telephone service in the State of Washington, for the reason that said rates and charges are confiscatory of plaintiff's property used or useful in furnishing said service to the [fol. 4] public, and, in consequence, said order seeks to deprive plaintiff of its property without due process of law, and denies to plaintiff the equal protection of the law in violation of its rights under the Fourteenth Amendment of the Constitution of the United States, and is therefore null and void.

The amount in controversy in this suit exceeds the sum or value of $3,000, exclusive of interest and costs.

IV. That on August 8, 1919, the Public Service Commission of Washington, an administrative body duly created by the statutes of said state, and the predecessor of, exercising like powers as the said Department of Public Works, made an order prescribing the maximum rates and charges to be charged by plaintiff on and after August 1, 1919, for telephone service, both exchange and toll, within the State of Washington. A copy of said rates applicable to Seattle and Tacoma, applicable to farmer line rates effective through-

out the State, and toll rates effective therein, is filed herewith, marked Exhibit "A" and hereby specially referred to and made a part hereof.

[fol. 5] V. That on September 20, 1922, plaintiff filed with the said Department a schedule of rates to be charged by plaintiff for exchange telephone service in said state. That said schedule increased the rates to be charged for exchange telephone service in substantially all the exchanges owned and operated by plaintiff in the State of Washington.

VI. That on September 24, 1922, the said Department issued an order suspending for the full statutory period the operation of said rates so filed by plaintiff on September 20, 1922, and directing the plaintiff to file for the consideration of said Department a toll rate schedule conforming in principle with the toll rates filed by the plaintiff and effective prior to the war period.

VII. That on October 5, 1922, the plaintiff filed, as directed aforesaid, a toll rate schedule, a copy of which is filed herewith, marked Exhibit "B" and hereby specially referred to and made a part hereof, and concurrently therewith filed with said Department [fol. 6] a withdrawal and cancellation of the rates filed by it on September 20, 1922, except the rates and charges applicable to the cities of Seattle and Tacoma. That schedule of rates so filed by it on September 20, 1922, for Seattle and Tacoma and not withdrawn and cancelled are filed herewith, marked Exhibit "C" and hereby specially referred to and made a part hereof.

VIII. That subsequent to the dates hereinbefore mentioned and between December 18, 1922, and March 1, 1923, said Department held numerous hearings in the State of Washington for the purpose of determining the value of plaintiff's property used or useful in rendering telephone service in the State of Washington; the reasonableness or unreasonableness of the rates and charges then being charged by plaintiff in said state; the reasonableness or unreasonableness of the schedule of rates and charges applicable to the toll service filed as aforesaid by plaintiff on October 5, 1922; and the reasonableness or unreasonableness of the schedule of exchange rates applicable to Seattle and Tacoma filed as aforesaid on September 20, 1922. That on the 31st day of March, 1923, two of the three members of said Department filed an order, a copy of which is filed herewith, marked Exhibit "D" and hereby specially referred to and made a part hereof, whereby the application of plaintiff to increase its rates for service was in all respects denied. That on the same date, to-wit, March 31, 1923, the Supervisor of Public Utilities and a member of said Department who was present at all of said hearings, filed a dissenting opinion, a copy of which is filed herewith, marked Exhibit "E" and hereby specially referred to and made a part hereof, by the terms of which he found that the rates, both toll and exchange, then and theretofore being charged by plaintiff, were unreasonable and less than sufficient, and in which he fixed certain rates, both toll and exchange, as reasonable and not more

than sufficient. That said rates so found as reasonable by said Supervisor of Public Utilities, as set forth in said dissenting opinion (Exhibit "E"), are the rates set forth by plaintiff in the schedule filed herewith, marked Exhibit "F" and hereby specially referred to and made a part hereof, which the plaintiff proposes to establish and make effective pending the final decree in this cause. That the toll rates set forth in Exhibit "F" are the same as the toll rates set forth in Exhibit "B."

[fol. 8] IX. That the Home Telephone and Telegraph Company of Spokane is a corporation organized and existing under and by virtue of the laws of the State of Washington, and is the owner of and operates the telephone system furnishing telephone service to the City of Spokane and the territory immediately adjacent thereto. That all of the capital stock of said Home Company of Spokane is owned by plaintiff and because of such stock ownership said Department, in considering plaintiff's application for increased rates, treated the Spokane Exchange as an exchange of plaintiff, and in arriving at the rate base for the State of Washington, included therein the property used and useful in furnishing telephone service to said City of Spokane and the territory immediately adjacent thereto. That the validity of the said order of said Department of March 31, 1923, as affecting the rates for telephone service in the said City of Spokane and territory immediately adjacent thereto, is the subject of a separate suit brought or about to be brought in this court by said The Home Telephone and Telegraph Company of Spokane.

[fol. 9] X. The cost to plaintiff of its property in the State of Washington (not including Spokane, that being the property of said Home Company of Spokane as aforesaid, and land being included at present value), now being used or useful in furnishing its telephone and telegraph service to the public therein and exclusively devoted to the rendition of that service, was, as of the 31st day of December, 1922 the sum of $29,347,254. The cost to plaintiff of its property constituting its Seattle Exchange and now being used or useful in furnishing telephone service therein, was, as of the 31st day of December, 1922, the sum of $17,023,372, and the cost to plaintiff of its property constituting its Tacoma Exchange and used or useful in furnishing telephone service therein was, as of the 31st day of December, 1922, the sum of $2,888,021, the two cities named thus constituting sixty-eight per cent of plaintiff's property in the State of Washington. That the cost to plaintiff of its said property in the State of Washington, in the City of Seattle and in the City of Tacoma is now somewhat in excess of the amounts hereinbefore mentioned on account of the additions and betterments in the mean-[fol. 10] time made to said respective properties. That the cost to plaintiff of its property in the State of Washington and in the cities of Seattle and Tacoma is substantially the rate base fixed by the Department of Public Works in its said order of March 31, 1923, as of the 30th day of June, 1922, with additions and betterments thereto made since that time (excluding the Spokane Exchange from the rate base of the Department). The present cost of repro-

duction of said property as it existed on the 31st day of December, 1922, is the sum of $48,087,785 for the State of Washington (not including Spokane); the sum of $27,149,130 for the City of Seattle, and the sum of $4,998,964 for the City of Tacoma. That the cost of reproduction of said property less depreciation, as of the 31st day of December, 1922, is the sum of $43,962,085 for the State of Washington; the sum of $24,919,930 for the City of Seattle, and the sum of $4,534,264 for the City of Tacoma. The fair and reasonable value of said property for said state (not including Spokane) is the sum of $35,616,896; for said City of Seattle the sum of $20,852,067, and for said City of Tacoma the sum of $3,457,290, all as of the 31st day of December, 1922, the two cities named thus constituting sixty-eight per cent of the total fair value of plaintiff's property in the State of Washington.

[fol. 11] The foregoing statements as to the cost to plaintiff of said respective properties include nothing on account of the item of franchises, or the item known as going concern value, but said latter item has been considered in determining the present cost of reproduction and the present fair and reasonable value of said property.

XI. The fair annual return which plaintiff is entitled to earn under rates imposed upon it by public authority is an amount equal to not less than eight per cent of the fair and reasonable value of its property used or useful in the rendition of the service covered by the rates in question.

XII. That the plaintiff's telephone business in the State of Washington has been conducted efficiently and economically during all of the times herein referred to. Plaintiff's net earnings derived from its telephone and telegraph business within the State of Washington stated in rate per cent annual return upon the cost of the property on the one hand and upon the fair value thereof, on the other, used or useful in furnishing said service and exclusively devoted to the rendition thereof during each of the periods [fol. 12] stated, have been as follows:

	Cost	Fair value
Year 1919, State of Washington	4.97%	3.67%
Year 1919, City of Seattle	3.97%	2.66%
Year 1919, City of Tacoma	.98%	.81%
Year 1920, State of Washington	4.42%	3.33%
Year 1920, City of Seattle	1.85%	1.29%
Year 1920, City of Tacoma	.89%	.74%
Year 1921, State of Washington	3.30%	2.58%
Year 1921, City of Seattle	.69%	.52%
Year 1921, City of Tacoma	.58%	.48%
Year 1922, State of Washington	3.17%	2.58%
Year 1922, City of Seattle	.19%	.15%
Year 1922, City of Tacoma	.89%	.75%

(Spokane not included.)

At all of the times aforesaid the fair and reasonable value of said property has been an amount substantially in excess of its cost.

XIII. That the rates of plaintiff in the State of Washington established and in force, as herein set forth, during the years 1919, 1920, 1921 and 1922, and which are in effect under the order of said [fol. 13] Department of March 31, 1923, were and are not compensatory and were and are less than just and reasonable rates. That the amounts by which the net revenue derived by the plaintiff from its telephone and telegraph business in the State of Washington and in the cities of Seattle and Tacoma, were less than eight per cent of the cost of the property used or useful in each case in and exclusively devoted to the rendition of service within said state and for the said cities were for the

Year 1919, State of Washington	$537,242
Year 1919, City of Seattle	312,793
Year 1919, City of Tacoma	187,587
Year 1920, State of Washington	686,716
Year 1920, City of Seattle	535,352
Year 1920, City of Tacoma	193,050
Year 1921, State of Washington	1,058,984
Year 1921, City of Seattle	833,945
Year 1921, City of Tacoma	205,110
Year 1922, State of Washington	1,310,651
Year 1922, City of Seattle	1,192,580
Year 1922, City of Tacoma	202,121

(Spokane not included.)

XIV. That the maintenance of the rates and charges as aforesaid [fol. 14] in Exhibit "A" under the order of said Department of March 31, 1923, compels the plaintiff to provide service at rates which are not compensatory and which are less than just and reasonable, and results in the confiscation of the property of plaintiff in the State of Washington and the cities of Seattle and Tacoma devoted to public use, and deprives plaintiff of its property without compensation and without due process of law and denies to it the equal protection of the laws, in violation of the Constitution of the United States, particularly Article Fifth and the Fourteenth Amendment thereof. That said order of March 31, 1923, is therefore null and void. That if said order of March 31, 1923, is enforced and plaintiff is compelled to charge the rates therein prescribed, and if plaintiff shall practice all reasonable economies consistent with adequate and efficient service to the public, the financial results will be as follows: Plaintiff will be prevented from earning any return in excess of 2.11 per cent per annum upon the fair and reasonable value of said property in said state, and .54 per cent loss per annum upon the fair and reasonable value of said property in said City of Seattle, and .56 per cent per annum upon the fair and reasonable value of

said property in said City of Tacoma. That had the rates set forth [fol. 15] in Exhibit "F," being the rates found by the Supervisor of Public Utilities in his dissenting order of March 31, 1923, to be just, fair, reasonable and sufficient, been in effect for the year 1923, the return to plaintiff thereunder on the fair value of its property would have been for the State of Washington 5.09 per cent; for the City of Seattle 2.81 per cent; for the City of Tacoma 3.96 per cent, and for the same period a return upon the cost of its property in the State of Washington, as found in said dissenting opinion, of 6.15 per cent; 3.42 per cent for the City of Seattle and 4.73 per cent for the City of Tacoma. And plaintiff avers that the rates and charges set forth in said Exhibit "F" are less than the just and reasonable rates and charges to which plaintiff is lawfully entitled, but plaintiff proposes to establish and put into effect said rates and charges pending the final decree in this cause.

XV. That the plaintiff has no adequate remedy at law, and should it fail to observe the rates and charges specified in said schedule Exhibit "A" and make and enforce the rates and charges as specified in Exhibit "F," or any rates or charges higher than those specified in said Exhibit "A," or any rates not sanctioned by the Department [fol. 16] of Public Works of Washington, the defendants will, unless restrained by the order of this court, institute and cause to be instituted proceedings to compel compliance with said schedule Exhibit "A," and the plaintiff, its directors, officers, agents and employees, will be subjected to a multiplicity of suits and incur the penalties and punishments prescribed by the laws of the State of Washington, and may, under the provisions of said laws, be charged with the commission of gross misdemeanors, each punishable under the laws of Washington by a fine of $1,000, or imprisonment in a county jail of one year, or both.

That unless the defendants are restrained and enjoined as herein prayed, plaintiff, its directors, officers, agents and employees, will be deterred and prevented by the threat of numerous and excessive fines and of imprisonment as aforesaid, from putting into effect the said schedule of rates and charges in said Exhibit "F," or any rates and charges other than those provided in said Exhibit "A," and thereby plaintiff will be forced to submit to the confiscation of its property without due process of law and in violation of its rights under the Constitution of the United States, as herein before alleged. [fol. 17] That unless the defendants are restrained and enjoined, as herein prayed, plaintiff's subscribers and other patrons will be induced and caused to resist and refuse payment of any rates and charges other than those provided in said Exhibit "A." That because of the nature of the business of the plaintiff and the small sums of money generally due monthly from each of its subscribers and patrons, it is impracticable for plaintiff to enforce collection thereof by actions at law, and as a result thereof plaintiff's property will be confiscated as aforesaid. That plaintiff has no practical way to enforce and collect its rates and charges except by cutting off and refusing service for default in payment of its bills rendered monthly

therefor, and its subscribers and patrons will, as plaintiff believes and so alleges, institute large numbers of suits in various jurisdictions throughout the State of Washington to restrain plaintiff from cutting off and denying service for such non-payment of bills and for damages, and plaintiff will thereby be subjected to an endless multiplicity of suits, and plaintiff's property will be confiscated, to plaintiff's irreparable loss and damage, all as hereinbefore alleged.
[fol. 18] That large numbers of suits will be brought in the courts of the State of Washington by defendants and plaintiff's subscribers and patrons to restrain and enjoin plaintiff, its directors, officers, agents and employees, from putting into effect said schedule Exhibit "F," or any schedule other than said Exhibit "A," and to compel plaintiff to furnish telephone service for the unlawful and confiscatory rates provided in said schedule Exhibit "A." That the issues which will be presented in each said suit are presented and should and will be decided in this action.

Wherefore, the plaintiff prays the judgment and decree of this court:

First. That the rates and charges set forth in said schedule Exhibit "A" and prescribed by said Department of Public Works be decreed to be confiscatory, in violation of the Constitution of the United States and the said order of March 31, 1923, imposing the same to be void and of no effect;

Second. That defendants, and each of them, and all other persons, be temporarily and permanently restrained and enjoined from any attempt to compel the plaintiff, its officers, agents and employees, to [fol. 19] observe, maintain or keep in force the rates, tariffs and charges now prescribed by said Department of Public Works, as set forth in said schedule Exhibit "A," filed herewith, or from any attempt to compel the plaintiff to continue to observe or maintain said rates or charges;

Third. That defendants, and each of them, and all other persons, be temporarily and permanently restrained and enjoined from any attempt to interfere with or prevent the plaintiff, its directors, officers, agents and employees, from immediately putting into effect said schedule Exhibit "F" and charging and collecting the rates and charges therein set forth until just and reasonable schedules of rates and charges are established according to law;

Fourth. That the defendants, and each of them, and all other persons, be temporarily and permanently restrained and enjoined from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees, to enforce any penalty or remedy against the plaintiff, its directors, officers, agents or employees, for disregarding said rates and charges Exhibit "A," or for putting into effect any schedule of rates and charges not in excess of those set forth in Exhibit "F";

[fol. 20] Fifth. That the plaintiff have such other and further relief as may be just and equitable in the premises.

May it please your Honors to grant unto the plaintiff a writ of subpœna of the United States of America issuing out of and under the seal of this Honorable Court directed to the said E. V. Kuykendall, Hance H. Cleland, Frank R. Spinning and John H. Dunbar commanding them, and each of them, on a day certain to be named, and under a certain penalty, to be and appear before this Honorable Court, then and there to answer, but not under oath (answer under oath being hereby expressly waived), all and singular the premises, and to perform and abide by such orders, direction or decree as may be made against them in the premises, and that pending the final hearing of this cause a temporary restraining order may be issued as above prayed.

And the plaintiff will ever pray.

The Pacific Telephone and Telegraph Company, By Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Its Solicitors.

[fol. 21] Jurat showing the foregoing was duly sworn to by G. E. McFarland omitted in printing.

[fol. 22] EXHIBIT "A" TO BILL OF COMPLAINT

The Pacific Telephone and Telegraph Company

Exchange Rates—Seattle, Tacoma, Washington; Farmer Line Rates —Exchanges State of Washington; Toll Rates—State of Washington, Effective August 1, 1919.

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Two-party Line	...	...
Extension (with or without bell)	1.00	1.00
Suburban Service—Ten-party Line (See Section 3)	3.50	3.75

Residence—Unlimited Service

Individual Line	3.75	4.00
Two-party Line	3.00	3.25
Four-party Line	2.50	2.75
Extension (without bell)	.50	.75
Extension (with bell)	.65	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

[fol. 23] Primary Rate Area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: November 4, 1918. Effective: March 1, 1919.

Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall-set	Desk set		
Individual Line	$6.50	$6.75	130	$.04
Auxiliary Line	2.50	2 75	...	...
Extension (with or without bell)	.75	.75	...	...

Residence—Measured Service

Individual Line	...	...	...	...
Extension (without bell)	...	...	...	...
Extension (with bell)	...	...	...	...

Business—Coin Box Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$.15	*	3	$.05
*25c per month additional.				
Extension (with or without bell) per month	1.00	1.00	...	...

[fol. 24] Residence—Coin Box Service

Individual Line	...
Extension (without bell) per month....	...
Extension (with bell) per month	...

Issued: November 4, 1918. Effective: March 1, 1919.
Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Tacoma, Pierce County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$7.00	$7.25
Two-party Line	6.00	6.25
Extension (with or without bell)	1.00	1.00
Suburban Service—Ten-party Line (See Section 3)	3.50	3.75

Residence—Unlimited Service

Individual Line	3.00	3.25
Two-party Line	2.50	2.75
Four-party Line	2.00	2.25
Extension (without bell)	.50	.75
Extension (with bell)	.65	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary Rate Area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: November 4, 1918. Effective: March 1, 1919.
Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

[fol. 25] W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Tacoma, Pierce County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$...	$...	...	$...
Auxiliary Line	...	...	...	...
Extension (with or without bell)	...	...	...	...

Residence—Measured Service

Individual Line	...	...	...	...
Extension (without bell)	...	...	...	...
Extension (with bell).	...	...	...	...

Business—Coin Box Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$.15	*	3	$.05

*25c per month additional.

Extension (with or without bell) per month)	1.00	1.00	...	...

Residence—Coin Box Service

Individual Line	...	...	...	...
Extension (without bell) per month....	...	...	...	...
Extension (with bell) per month	...	...	...	...

Issued: November 4, 1918. Effective: March 1, 1919.

Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

[fol. 26] W. P. S. C. No. 2, Section 2

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Unlimited Service

	Rate per month
Switchboard, with battery power, ringing circuit and switchboard telephone for each position, equipped for 15 lines..	$2.00
Additional switchboard equipment for each group of 5 lines or less	.20

First bothway trunk line—Individual business rate plus $2.00 per month.

Each additional bothway trunk line—Rate for first bothway trunk line less 25%.

Each incoming trunk line—Individual business rate less 20%, minimum $4.00 per month.

	Wall set	Desk set
Each Station, primary or extension, not in guest rooms (See Mileage Rates, Sec. 3)	$1.00	$1.00
Each Station, primary or extension, in guest rooms:		
1 to 10 inclusive	.50	.75
11 to 20 inclusive	.45	.70
21 to 35 inclusive	.40	.65
36 to 50 inclusive	.35	.60
Over 50	.25	.50

Minimum installation: Two (2) trunk lines and ten (10) stations excluding switchboard telephone.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: November 4, 1918. Effective: March 1, 1919.

Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

[fol. 27] W. P. S. C. No. 2, Section 2

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Measured Service

	Rate per month
Switchboard with battery power, ringing circuit and switchboard telephone for each position	None.
Trunk Lines—Bothway only	None.

(Enough bothway trunk lines will be provided to properly handle the traffic.)

Each exchange message	$.025

	Wall set	Desk set
Each Station, primary or extension, not in guest rooms (See Mileage Rates, Sec. 3)	$1.00	$1.00
Each Station, primary or extension, in guest rooms:		
1 to 10 inclusive	.50	.75
11 to 20 inclusive	.45	.70
21 to 35 inclusive	.40	.65
36 to 50 inclusive	.35	.60
Over 50	.25	.50

Minimum installation: Ten (10) stations, excluding switchboard telephones.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: September 1, 1916. Effective: September 1, 1916.*

Cancels and supersedes Exchange Rate Schedule effective January 1, 1912.

* In accordance with Order No. 1825 of the Public Service Commission of Washington.

P. H. Coolidge, General Commercial Superintendent.

[fol. 28] W. P. S. C. No. 2, Section 3

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Farmer Line Service

Total number of stations	Rate per year
300 stations or less	$3.00
300 to 500 stations	3.60
500 to 750 stations	4.20
750 to 1000 stations	5.40
1000 to 2000 stations	7.20
2000 to 4000 stations	8.40
4000 to 6000 stations	9.60
6000 to 8000 stations	10.80
8000 to 12000 stations	12.00
12000 stations and over	15.00

Company Furnishes.—For not less than 5 subscribers per circuit, switchboard, and facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, Company furnishes facilities to city or town limits. Central Office Service. Listing in Directory. Code Ring Card.

Subscriber Furnishes.—Facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, subscriber furnishes facilities to city or town limits. Complete telephone and battery, substation protection. Maintenance of above.

Subscriber will be allowed a discount of Ten Per Cent (10%) on the charge for exchange service, if bill is paid at the Company's office during the first month of the year. New subscribers will be billed from the date of connection to the end of the year, and annually in advance thereafter. Initial bills rendered new subscribers will be subject to a Ten Per Cent (10%) discount on the charge for exchange service, provided the bill is paid at the Company's office within thirty days after date of bill.

Farmer Line stations shall not be located within the Primary Rate Area.

[fol. 29] Issued: September 1, 1916. Effective: September 1, 1916.*

Cancels and supersedes Exchange Rate Schedule effective May 14, 1915.

*In accordance with Order No. 1825 of the Public Service Commission of Washington.

P. H. Coolidge, General Commercial Superintendent.

Telegraph and Telephone Service Bulletin No. 22

Order No. 2495

December 13, 1918.

There are many counties and districts in which a free toll service is granted the subscriber within such county or district, the exchange rate presumably having been made with a view of such free toll service. This Order shall not be construed as requiring a discontinuance of these privileges pending a study and revision of these exchange rates.

Nothing in this Order establishing toll rates shall be construed as changing rates made without reference to mileage now established for service within a certain county or other area when such rates are not in excess of ten cents, but no further rates of this character shall be established without specific approval of the Postmaster General.

[fol. 30] In competitive situations where the earning value of a property under Federal control would be unfavorably affected by the establishment of rates and charges herein ordered, an exception may be made by filing with the Postmaster General a statement to that effect with a proposal of modification from ordered rates and such modifications may go into effect unless vetoed or otherwise ordered by the Postmaster General within thirty days and during such thirty days existing rates may be continued.

I. Classification of Toll Telephone Service

The following classes of telephone toll message service shall be established effective at 12:01 A. M. January 21st, 1919.

1. Station-to-station Messages:

This service shall be defined by the following conditions:

(a) Orders for Station-to-Station service shall specify the telephone station called, either by telephone number, or by the name of the subscriber of the called station.

[fol. 31] (b) Under this classification, orders will not be accepted to establish communication between particular persons.

(c) The measurement of the duration of a Station-to-Station message for purposes of the application of rates shall begin at the moment when telephonic communication is established between the called and the calling stations. The term "station" for the purpose of this clause is defined to include a private branch exchange switchboard operator, in those cases where private branch exchange systems are involved in Station-to-Station service.

(d) Station-to-Station service may be operated as a Number Service, in which case the called station may be designated only by number, through A and B Switchboards or through tandem operator, etc: or it may be operated through toll switchboard, and technically known as an "A Y" service, depending on the local circumstances,

operating conditions, plant conditions, and the circumstances as to directory distribution and as to areas; and the more economical method will be employed in each case. The choice of method of operating Station-to-Station service will be determined solely as an operating arrangement not in any way affecting rates or service; [fol. 32] except that where the Number method is employed it is required that order be accepted stating only the telephone number of the called station.

(c) The charges for Station-to-Station messages shall not be "reversed," i. e., collected at the called station.

2. Person-to-person Calls:

This service shall be defined by the following conditions:

(a) Orders will be accepted to establish communication between specified persons.

(b) The measurement of the duration of the Person-to-Person message for the purpose of the application of rates shall begin at the moment when communication begins with or between the particular person or persons specified in the order; provided that certain Report charges will be made under the conditions specified in the clause next below, where communication may not be established.

(c) Orders for Person-to-Person service are accepted only under the condition that a limited charge (to be known as "Report Charge") will be made in the following cases where it is impossible to establish [fol. 33] communication between particular persons:

First. When the order is to establish communication with a particular person in a given city, telephone address unknown, and the particular person cannot be secured within one hour (exclusive of any time during which "no circuit" or other cause prevents communication of the order to the distant city or exchange, or its completion.)

Second. When the designated person called refused to talk.

Third. When the report is returned that the designated person called is "out" or "out and will return at (specified time)" or "out and time of return unknown," "is absent from the city," and similar report advising the calling subscriber of the facts ascertained when failure to complete the order is due solely to the circumstances of the called person or to fault in describing the location of the called person, and when all of the work preliminary to establishing communication with the called person is done.

Fourth. When communication between the designated persons cannot be established because the designated person at the calling [fol. 34] station is absent at the calling station; provided, that no charge shall be made in such cases where the delay, if any, in establishing connection is greater than one hour.

Fifth. When the designated person at the calling station refuses to talk when the facilities for communication have been established.

3. Appointment Calls:

Appointment calls are Person-to-Person calls, the order for which provides that communication is to be arranged for to take place at a specified time.

4. Messenger Calls:

Messenger calls are Person-to-Person calls requiring the use of a messenger to secure attendance of a designated person at one of the public pay stations at the distant point.

5. Collect Calls:

Collect calls are Person-to-Person calls, charges for which are "reversed," i. e., to be collected from the subscriber of the distant station at which the call is to be completed.

[fol. 35] II. Standard Toll Rates for Station-to-station Messages

Effective 12:01 A. M., January 21, 1919, following initial period rates are made standard throughout the United States for Station-to-Station toll messages where the distance between the exchanges, or toll points, does not exceed 40 miles by direct air line measurement:

For distances more than	But not more than	Initial rate is
0 Miles	6 Miles	$0.05
6 "	12 "	.10
12 "	18 "	.15
18 "	24 "	.20
24 "	32 "	.25
32 "	40 "	.30

The following initial period rates are made standard for Station-to-Station toll messages for all distances in excess of 40 miles by direct air line measurement:

For distances more than	But not more than	Initial rate is
40 Miles	48 Miles	$0.35
48 "	56 "	.40

For each additional 8 miles or fraction thereof, 5 cents additional.

[fol. 36] For the purpose of applying standard rates where the direct air line distance between points is in excess of 40 miles, distance shall be determined as the air line distance between the center of blocks seven miles square, within which the points of communication are located, and where the distance is in excess of 350 miles

by the air distance between the centers of section 35 miles square. The block and section scaling system for purposes of measuring toll rate distance between points more than 40 miles distant by direct measurement, shall consist of a grid containing sections 35 miles square, each section subdivided into 25 blocks 7 miles square, so placed on a polyconic projection of a Government Survey map of the United States that section lines coincide with a line drawn approximately north and south through the center of the United States and with a line at right angles thereto passing through the northwestern point of the international boundary line in the *Straight* of Georgia.

III. Standard Toll Rates for Other Classes of Toll Calls

Effective 12:01 A. M., January 21, 1919, the following toll message rates are established for Person-to-Person calls, Appointment calls and Messenger calls:

[fol. 37] 1. The initial period rate for Person-to-Person Calls shall be approximately 25 per cent in addition to the Station-to-Station rate between the same points, in accordance with the schedule of computed rates for person-to-person, appointment and messenger toll calls, attached hereto, and hereby made a part of this order; but no Person-to-Person rate shall be less than 20 cents.

2. In those cases where Person-to-Person calls are not computed and a report is made or the conditions are such as described in paragraph I,2 (c) of this Order, a Report Charge shall be made of approximately one-fourth the initial rate for Station-to-Station messages between the same points, in accordance with these schedules of computed rates for Person-to-Person, appointment and messenger toll calls, attached hereto and hereby made a part of this Order; but no Report Charge shall be less than 10 cents for any one call, nor more than $2.00.

3. The rates for Appointment Calls shall be approximately 50 per cent in addition to the rate for Station-to-Station messages between the same points in accordance with the schedule of computed rates for Person-to-Person, appointment and messenger toll calls, [fol. 38] hereto attached and hereby made a part of this order; but in the case of any Appointment Call order, where the distant station is reached, whether the appointment be made or not, the Report Charge applicable in case of Person-to-Person Calls between the same points shall be made. No Appointment Calls shall be accepted where the Station-to-Station rate is less than 15 cents.

4. The rates for Messenger Calls shall be the same as applied to Appointment Calls between the same points plus any charges that may be required for the service of messenger. No messenger Calls shall be accepted where the Station-to-Station rate is less than 15 cents.

IV. Standard Toll Night Rates

Effective 12:01 A. M., January 21, 1919, the following reductions shall be made in the rate and charges for Station-to-Station messages only, between the hours of 8:30 P. M. and 4:30 A. M.

1. Between the hours of 8:30 P. M. and 12:00 Midnight, the Night Rate for Station-to-Station messages shall be approximately 50 per cent less than the regular Day Rate, in accordance with the schedule of computed night rates, attached hereto and hereby made a [fol. 39] part of this Order; but no Night Rate shall be less than 25 cents.

2. Between the hours of 12:00 Midnight and 4:30 A. M., the Night Rates shall be approximately 75 per cent less than the established Day Rate, in accordance with the schedule of computed night rates attached hereto, and hereby made a part of this Order; but no Night Rate shall be less than 25 cents.

3. For the purpose of applying Night Rates, the time of day at the point at which a Station-to-Station message originates shall be used.

4. Day rate only shall be employed between the hours of 4:30 A. M. and 8:30 P. M.

V. Standard Initial Period, Overtime Period, and Overtime Rate

Effective 12:01 A. M., January 221, 1919, the following initial period, overtime period and overtime rates are made standard in connection with all toll calls and messages made at standard initial toll rates:

[fol. 40] 1. Standard Initial Period and Overtime Period:

Where the initial rate is	The initial period is	The overtime period is
$0.05	5 Minutes	5 Minutes
.10	5 Minutes	3 Minutes
.15	5 Minutes	2 Minutes
.20	5 Minutes	2 Minutes
.25	5 Minutes	1 Minute
.30	3 Minutes	1 Minute
.35	3 Minutes	1 Minute
All other rates	3 Minutes	1 Minute

Where Person-to-Person calls are accepted at the above Initial Rate, the initial period is 3 minutes and the overtime period is 1 minute.

2. Standard Overtime Rates are as Follows:

Where the initial rate is	The overtime rate is
$0.05	$0.05
.10	.05
.15	.05
.20	.05
.25	.05
.30	.10
.35	.10

and thereafter approximately one-third of the initial rate, and in no case more than one-third of the initial rate, in accordance with the table of computed overtime charges hereto attached and hereby made a part of this order.

A. S. Burleson, Postmaster General.

[fol. 41] Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls

Where the station-to-station day rate is	The completed person-to-person rate is	The completed appointment and messenger rate is	The report charge is
$.05	Not Quoted	Not Quoted	Not Quoted
.10	Not Quoted	Not Quoted	Not Quoted
.15	.20	.25	.10
.20	.25	.30	.10
.25	.30	.35	.10
.30	.40	.45	.10
.35	.45	.50	.10
.40	.50	.60	.10
.45	.55	.65	.15
.50	.60	.75	.15
.55	.65	.80	.15
.60	.75	.90	.15
.65	.80	.95	.20
.70	.85	1.05	.20
.75	.90	1.10	.20
.80	1.00	1.20	.20
.85	1.05	1.25	.25
.90	1.10	1.35	.25
.95	1.15	1.40	.25
1.00	1.25	1.50	.25
1.05	1.30	1.55	.30
1.10	1.35	1.65	.30
1.15	1.40	1.70	.30
1.20	1.50	1.80	.30
1.25	1.55	1.85	.35
1.30	1.60	1.95	.35
1.35	1.65	2.00	.35
1.40	1.75	2.10	.35
1.45	1.80	2.15	.40
1.50	1.85	2.25	.40
1.55	1.90	2.30	.40
1.60	2.00	2.40	.40
1.65	2.05	2.45	.45
1.70	2.10	2.55	.45
1.75	2.15	2.60	.45
1.80	2.25	2.70	.45
1.85	2.30	2.75	.50
1.90	2.35	2.85	.50
1.95	2.40	2.90	.50
2.00	2.50	3.00	.50
And thereafter increasing in 5 cent steps.	And thereafter 25% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, 25% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter 50% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 2, 50% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter one - fourth Station - to - Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, one-fourth the Station - to - Station day rate computed to the next higher multiple of 5 cents; but no Report Charge will exceed $2.00.

[fol. 42] Schedule of Computed Night Rates for Station-to-station Toll Messages

When the day rate is	The rate between 8:30 p. m. and 12:00 midnight is	The rate between 12 midnight and 4:30 a. m. is
$.05	Day Rate	Day Rate
.10	Day Rate	Day Rate
.15	Day Rate	Day Rate
.20	Day Rate	Day Rate
.25	Day Rate	Day Rate
.30	.25	.25
.35	.25	.25
.40	.25	.25
.45	.25	.25
.50	.25	.25
.55	.30	.25
.60	.30	.25
.65	.35	.25
.70	.35	.25
.75	.40	.25
.80	.40	.25
.85	.45	.25
.90	.45	.25
.95	.50	.25
1.00	.50	.25
1.05	.55	.30
1.10	.55	.30
1.15	.60	.30
1.20	.60	.30
1.25	.65	.35
1.30	.65	.35
1.35	.70	.35
1.40	.70	.35
1.45	.75	.40
1.50	.75	.40
1.55	.80	.40
1.60	.80	.40
1.65	.85	.45
1.70	.85	.45
1.75	.90	.45
1.80	.90	.45
1.85	.95	.50
[fol. 43]		
1.90	.95	.50
1.95	1.00	.50
2.00	1.00	.50
And thereafter increasing in 5 cent steps.	And thereafter one-half the day rate. When the day rate is not evenly divisible by 2, one-half the day rate computed to the next higher multiple of 5 cents.	And thereafter one-fourth the day rate. When the day rate is not evenly divisible by 4, one-fourth the day rate, computed to the next higher multiple of 5 cents.

[fol. 44]

Where the initial rate is	The initial period is	Overtime rate is	The computed charges are for						
			4 min.	5 min.	6 min.	7 min.	8 min.	9 min.	10 min.
$.05	5 Min.	$.05	$.05	$.05	$.10	$.10	$.10	$.10	$.10
.10	5 Min.	.05	.10	.10	.15	.15	.15	.20	.20
.15	5 Min.	.05	.15	.15	.20	.20	.25	.25	.30
.20*	5 Min.	.05	.20	.20	.25	.25	.30	.30	.35
.25*	5 Min.	.05	.25	.25	.30	.35	.40	.45	.50
.30	3 Min.	.10	.40	.50	.60	.70	.80	.90	1.00
.35	3 Min.	.10	.45	.55	.65	.75	.85	.95	1.05
.40	3 Min.	.10	.50	.60	.70	.80	.90	1.00	1.10
.45	3 Min.	.15	.60	.75	.90	1.05	1.20	1.35	1.50
.50	3 Min.	.15	.65	.80	.95	1.10	1.25	1.40	1.55
.55	3 Min.	.15	.70	.85	1.00	1.15	1.30	1.45	1.60
.60	3 Min.	.20	.80	1.00	1.20	1.40	1.60	1.80	2.00
.65	3 Min.	.20	.85	1.05	1.25	1.45	1.65	1.85	2.05
.70	3 Min.	.20	.90	1.10	1.30	1.50	1.70	1.90	2.10
.75	3 Min.	.25	1.00	1.25	1.50	1.75	2.00	2.25	2.50
.80	3 Min.	.25	1.05	1.30	1.55	1.80	2.05	2.30	2.55
.85	3 Min.	.25	1.10	1.35	1.60	1.85	2.10	2.35	2.60
.90	3 Min.	.30	1.20	1.50	1.80	2.10	2.40	2.70	3.00
.95	3 Min.	.30	1.25	1.55	1.85	2.15	2.45	2.75	3.05
Add 1.00 thereafter increasing in 5 cent steps.	And thereafter 3 minutes for all rates.	And thereafter one-third the initial rate to the nearest multiple of 5 cents, but not more than one-third the initial rate.	1.30	1.60	1.90	2.20	2.50	2.80	3.10

And thereafter in accordance with the above applied system of computation, for each higher rate and each additional overtime period or fraction thereof.

*Where person-to-person calls are accepted at these rates the initial period is 3 minutes and the overtime period is one minute.

[fol. 45] Telegraph and Telephone Service

Order No. 2797

February 17, 1919.

Order No. 2495 issued by me on December 13th, 1918, provided certain charges for classes of telephone toll service to be effective January 21, 1919.

1. To meet public demand for particular person, messenger and appointment calls on short haul toll messages and which in the interest of the public service it is desirable to furnish, the following schedule will become effective February 21, 1919, by all companies furnishing telephone toll service to the public:

For distance of twelve miles or less, station-to-station rate is 10 cents.

The completed person-to-person rate is 15 cents.

Completed appointment and messenger rate is 20 cents.

The report charge is 5 cents.

The initial period for person-to-person messages at an initial rate of 15 cents will be three minutes and the overtime rate will be 5 cents for each additional minute.

In the case of those routes where the companies prior to January 21, 1919, provided station-to-station or two-number service ex-
[fol. 46] clusively, this practice shall be continued hereafter where the distance is 12 miles or less, at the rates prescribed and under the conditions in Order No. 2495. In the case of those routes where there were in effect prior to January 21, 1919, station-to-station or two-number rates of 5 cents for distances not to exceed 6 miles the rate of 5 cents shall be continued.

2. In cases where it has been and is impracticable or impossible to build direct toll lines between communities on account of natural barriers such as mountains, waterways, and so forth, or in other extraordinary or exceptional cases, the operating board is authorized to suspend in part or entirely Order No. 2495, and to restore in whole or in part, the rates in effect immediately prior to January 21, 1919. Where such suspensions are made, the operating board shall make report of each case to me and such suspensions shall continue in effect until otherwise ordered by the operating board or the Postmaster General.

3. Nothing in Order No. 2495 or this bulletin shall be construed as affecting arrangements or basis of settlements between connecting companies in effect on January 20, 1919.

A. S. Burleson, Postmaster General.

[fol. 47] EXHIBIT "B" TO BILL OF COMPLAINT

The Pacific Telephone and Telegraph Company

Toll Rate Schedule Filed October 5, 1922

State of Washington

The Pacific Telephone and Telegraph Company State of Washington Inter-Exchange Rates for Intrastate Telephone Toll Messages

I. Classification of Intrastate Toll Telephone Service

The following classes of telephone toll message service shall be furnished effective 12:01 A. M. —— 21, 1922:

1. Station-to-station Messages.—This service shall be defined by the following conditions:

(a) Orders for station-to-station service shall specify the telephone station called, either by telephone number, or by the name of the subscriber of the called station.

[fol. 48] (b) Under this classification, orders will not be accepted to establish communication between particular persons.

(c) The measurement of the duration of a station-to-station message for purposes of the application of rates shall begin at the moment when telephonic communication is established between the called and the calling stations. The term "station" for the purpose of this clause is defined to include a private branch exchange switchboard operator, in those cases where private branch exchange systems are involved in station-to-station service.

(d) Station-to-station service may be operated as a Number Service, in which case the called station may be designated only by number, through A and B switchboards, or through tandem operators, etc.; or it may be operated through toll switchboards, and technically known as an "AY" service, depending on the local circumstances as to operating conditions, plant conditions, and the circumstances as to directory distribution and areas; and the more economical method will be employed in each case. The choice of method of operating station-to-station service will be determined solely as an [fol. 49] operating arrangement, not in any way affecting rates or service; except that where the number method is employed orders will be accepted stating only the telephone number of the called station.

(e) The charges for station-to-station messages shall not be "reversed," i. e., collected at the called station.

2. Person-to-person Calls.—This service shall be defined by the following conditions:

(a) Orders will be accepted to establish communication between specified persons.

(b) The measurement of the duration of a person-to-person message for the purpose of the application of rates shall begin at the moment when communication begins with or between the particular person or persons specified in the order; provided that certain report charges will be made under the conditions specified in the clause next below, where communication may not be established.

(c) Orders for person-to-person service shall be accepted only under the condition that a limited charge (to be known as "Report Charge") will be made in the following cases where it is impossible to establish communication between particular persons:

[fol. 50] (1) When the order is to establish communication with a particular person in a given city, telephone address unknown, and the particular person can not be secured within one hour (exclusive of any time during which "no circuits" or other cause prevent communication of the order to the distant city or exchange, or its completion.)

(2) When the designated person called refuses to talk.

(3) When the report is returned that the designated person called is "out" or "out and will return at (specified time)" or "out and time of return unknown," "is absent from the city," and similar reports advising the calling subscriber of the facts ascertained when failure to complete the order is due solely to the circumstances of the called person or to fault in describing the location of the called person, and when all of the work preliminary to establishing communication with the called person is done.

(4) When communication between the designated persons can not be established because the designated person at the calling station is absent at the calling station; provided that no charge shall be made in such cases where the delay, if any, in establishing connection is greater than one hour.

[fol. 51] (5) When the designated person at the calling station refuses to talk when the facilities for communication have been established.

3. Appointment Calls.—Appointment calls are person-to-person calls, the order for which provides that communication is to be arranged for to take place at a specified time.

4. Messenger Calls.—Messenger calls are person-to-person calls requiring the use of a messenger to secure attendance of a designated person at one of the public pay stations at the distant point.

5. Collect Calls.—Collect calls are person-to-person calls, the charges for which are "reversed," i. e., to be collected from the subscriber of the distant station at which the call is to be completed.

II. Toll Rates for Intrastate Station-to-station Messages

Effective 12:01 A. M., —— 21, 1922, the following initial period rates are established for toll messages where the distance between exchanges, or toll points, does not exceed 40 miles by direct measurement on a U. S. Government Post Route Map.

[fol. 52]

For distances more than	But not more than	Initial rate
0 Miles	12 Miles	$0.10
12 "	18 "	.15
18 "	24 "	.20
24 "	32 "	.25
32 "	40 "	.30

The following initial period rates are established for station-to-station toll messages for all distances in excess of 40 miles by direct air line measurement:

For distances more than	But not more than	Initial rate
40 Miles	48 Miles	$0.35
48 "	56 "	.40

For each additional 8 miles or fraction thereof, 5 cents additional.

For the purpose of applying standard rates where the direct air line distance between points is in excess of 40 miles, distance shall be determined as the air line distance between the centers of blocks 7 miles square, within which the points of communication are located, and where the distance is in excess of 350 miles by the air line distance between the centers of sections 35 miles square.

The block and section scaling system for purposes of measuring [fol. 53] toll rate distance between points more than 40 miles distant by direct measurement, shall consist of a grid containing sections 35 miles square, each section subdivided into 25 blocks seven miles square, so placed on a polyconic projection of a Government survey map of the United States that section lines coincide with a line drawn approximately north and south through the center of the United States and with a line at right angles thereto passing through the northwestern point of the International boundary line in the *Straight* of Georgia.

III. Toll Rates for Other Classes of Toll Calls

Effective 12:01 A. M., —— 21, 1922, the following toll message rates are established for person-to-person calls, appointment calls, and messenger calls:

1. The initial period rates for person-to-person calls shall be approximately 25 per cent in addition to the station-to-station rates

between the same points, in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls, attached hereto, but no person-to-person rate shall be less than 15 cents.

2. In those cases where person-to-person calls are not com-
[fol. 54] pleted and a report is made or the conditions are such as described in paragraph I, 2 (c) of this schedule a report charge shall be made of approximately one-fourth the initial rate for station-to-station messages between the same points, in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls, attached hereto and hereby made a part of this schedule; but no report charge shall be less than 5 cents for any one call, nor more than $2.00.

3. The rates for appointment calls shall be approximately 50 per cent in addition to the rates for station-to-station messages between the same points in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Call, hereto attached and hereby made a part of this schedule; but in the case of an appointment call order, where the distant station is reached, whether the appointment be made or not, the Report Charge applicable in case of person-to-person calls between the same points shall be made.

4. The rates for messenger calls shall be the same as applied to appointment calls, between the same points, plus any charges that may be required for the service of messengers.

[fol. 55] IV. Standard Toll Night Rates

Effective 12:01 A. M., —— 21, 1922, the following reductions shall be effective in the rates and charges for station-to-station messages only, between the hours of 8:30 P. M. and 4:30 A. M.

1. Between the hours of 8:30 P. M. and 12 midnight, the night rates for station-to-station messages shall be approximately 50 per cent less than the regular day rates, in accordance with the Schedule of Computed Night Rates attached hereto and hereby made a part of this schedule, but no night rate shall be less than 25 cents.

2. Between the hours of 12 midnight and 4:30 A. M., the night rates shall be approximately 75 per cent less than the established day rates, in accordance with the Schedule of Computed Night Rates attached hereto, and hereby made a part of this schedule; but no night rate shall be less than 25 cents.

3. For the purpose of applying night rates, the time of day at the point at which a station-to-station message originates shall be used.

4. Day rates only shall be employed between the hours of 4:30 A. M. and 8:30 P. M.

[fol. 56] V. Initial Periods, Overtime Periods, and Overtime Rates

Effective 12:01 A. M. —— 21, 1922, the following initial periods, overtime periods and overtime rates are established:

Classification,	Initial Period,	Overtime Period
Station-Station	3 Minutes	1 Minute
Person-Person	2 Minutes	1 Minute
Messenger and appointment	2 Minutes	1 Minute

The Overtime rates shall be—

Station-to-station:

Where the initial rate is	Overtime rate per period
$0.10	$0.05
.15	.05
.20	.05
.25	.05
.30	.10
.35	.10
.40	.10
.45	.15

and thereafter approximately one-third of initial rate and in no case more than one-third of the initial rate.

[fol. 57] Person-to-person and Messenger and Appointment:

Where the initial rate is	Overtime rate per period
*$0.15	$0.05
.20	.10
.25	.10
.30	.15
.35	.15
.40	.20
.45	.20

and thereafter approximately one-half of the initial rate and in no case more than one-half of the initial rate.

*Minimum Messenger and Appointment Rate 20 cents.

Schedule of Computed Night Rates for Station-to-station Toll Messages

When the day rate is	The rate between 8:30 p. m. and 12:00 midnight is	The rate between 12 midnight and 4:30 a. m. is
$.10	Day Rate	Day Rate
.15	Day Rate	Day Rate
.20	Day Rate	Day Rate
.25	Day Rate	Day Rate
.30	.25	.25
.35	.25	.25
.40	.25	.25
.45	.25	.25
.50	.25	.25
.55	.30	.25
.60	.30	.25
.65	.35	.25
.70	.35	.25
[fol. 58] .75	.40	.25
.80	.40	.25
.85	.45	.25
.90	.45	.25
.95	.50	.25
1.00	.50	.25
1.05	.55	.30
1.10	.55	.30
1.15	.60	.30
1.20	.60	.30
1.25	.65	.35
1.30	.65	.35
1.35	.70	.35
1.40	.70	.35
1.45	.75	.40
1.50	.75	.40
1.55	.80	.40
1.60	.80	.40
1.65	.85	.45
1.70	.85	.45
1.75	.90	.45
1.80	.90	.45
1.85	.95	.50
1.90	.95	.50
1.95	1.00	.50
2.00	1.00	.50
And thereafter increasing in 5 cent steps.	And thereafter one-half the day rate. When the day rate is not evenly divisible by 2, one-half the day rate computed to the next higher multiple of 5 cents.	And thereafter one-fourth the day rate. When the day rate is not evenly divisible by 4, one-fourth the day rate, computed to the next higher multiple of 5 cents.

[fol. 59] Schedule of Computed Rates for Person-to-person, Appointment, and Messenger Toll Calls

When the station-to-station day rate is	The completed person-to-person rate is	The completed appointment and messenger rate is	The report charge is
$0.10	$0.15	$0.20	$0.05
.15	.20	.25	.10
.20	.25	.30	.10
.25	.30	.35	.10
.30	.40	.45	.10
.35	.45	.50	.10
.40	.50	.60	.10
.45	.55	.65	.15
.50	.60	.75	.15
.55	.65	.80	.15
.60	.75	.90	.15
.65	.80	.95	.20
.70	.85	1.05	.20
.75	.90	1.10	.20
.80	1.00	1.20	.20
.85	1.05	1.25	.25
.90	1.10	1.35	.25
.95	1.15	1.40	.25
1.00	1.25	1.50	.25
1.05	1.30	1.55	.30
1.10	1.35	1.65	.30
1.15	1.40	1.70	.30
1.20	1.50	1.80	.30
1.25	1.55	1.85	.35
1.30	1.60	1.95	.35
1.35	1.65	2.00	.35
1.40	1.75	2.10	.35
1.45	1.80	2.15	.40
1.50	1.85	2.25	.40
1.55	1.90	2.30	.40
1.60	2.00	2.40	.40
1.65	2.05	2.45	.45
1.70	2.10	2.55	.45
1.75	2.15	2.60	.45
1.80	2.25	2.70	.45
1.85	2.30	2.75	.50
1.90	2.35	2.85	.50
1.95	2.40	2.90	.50
2.00	2.50	3.00	.50
And thereafter increasing in 5 cent steps.	And thereafter 25% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, 25% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter 50% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 2, 50% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter one-fourth the Station - to - Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, one-fourth the Station - to - Station day rate computed to the next higher multiple of 5 cents; but no Report Charge will exceed $2.00.

[fol. 60] EXHIBIT C TO BILL OF COMPLAINT

The Pacific Telephone and Telegraph Company

Exchange Rates—Seattle-Tacoma, Washington—Filed September 20, 1922, and Not Withdrawn

W. D. P. W. No. 3, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$12.00	$12.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line (See Section 3)	3.50	3.75

Business Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$ .05
Extension (with or without bell)	.75	1.00	...	.....

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ .25	$ *	$ .05

[fol. 61] *25c per month additional.

Extension (with or without bell) per month	1.00	1.25	.....

Residence—Uulimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.75	$5.00
Two-party Line	4.00	4.25
Four-party Line	3.25	3.50
Extension (with or without bell)	.75	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary rate area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Farmer Line Service (See Section 3), each station, $15.00 per year.

Issued: October 2, 1922. Effective: November 1, 1922.

Cancels and supersedes Exchange Rate Schedule effective March 1, 1919.

P. H. Coolidge, General Commercial Superintendent.

W. D. P. W. No. 3, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Tacoma, Pierce County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.00	$10.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line (See Section 3)	3.50	3.75

[fol. 62]

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	....

Semi-public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$ *.	$.05
*25c per month additional.			
Extension (with or without bell) per month	1.00	1.25	....

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.00	$4.25
Two-party Line	3.25	3.50
Four-party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary rate area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Farmer Line Service (See Section 3), each station $15.00 per year.

Issued: October 2, 1922. Effective: November 1, 1922.

Cancels and supersedes Exchange Rate Schedule effective March 1, 1919.

P. H. Coolidge, General Commercial Superintendent.

[fol. 63] W. D. P. W. No. 3, Section 2

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Semi-public

Private Branch Exchange Service

Hotels desiring intercommunication between guest rooms stations and management stations and exterior service for both guest room and management stations shall be furnished semi-public private branch exchange service subject to the following conditions:

(a) The hotel proprietor is required to become and act as the telephone company's agent in furnishing and selling telephone service to guests.

(b) The hotel agreeing:

(1) To charge the authorized rates for all telephone service rendered to guests and patrons.

(2) To collect for the telephone company at the established rates for exchange and interexchange service the charges incurred by patrons and guests and to remit such charges to the telephone company.

(3) To maintain service at proper standards.

(4) To furnish all operating at the private branch exchange switchboard for the transmission supervision and recording of messages sent to the central office from the private branch exchange system.

(c) The telephone company agreeing:

(1) To furnish facilities and exchange service in accordance with the following schedules, and interexchange service at published rates.

(2) To pay the hotel a commission on exchange and interexchange messages originating at guest room and lobby stations and charged to the hotel.

[fol. 64] Switchboard with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless type	$3.00
Non-multiple cord type:	
10 lines or less in use	5.00
11—30 lines in use	6.00
31—60 lines in use	7.00
61—100 lines in use	8.00
101—150 lines in use	9.00
151—200 lines in use	10.00
201—260 lines in use	11.00
261—320 lines in use	13.00
Multiple cord type:	
Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jacks or portion thereof	.30
(a) Stations in hotel office and other locations on premises in which switchboard is located for the exclusive use of the hotel management:	
Each station, without dial—Wall Set	1.00
Desk Set	1.25
Each station, with dial—Wall Set	1.25
Desk Set	1.50

Stations outside premises in which switchboard is located, See Mileage Rates—Sec. 3.

(b) Stations in guest rooms and lobby:

Each station, without dial—Wall Set.....	.50
Desk Set.....	.75
Each station, with dial—Wall Set.....	.75
Desk Set.....	1.00

Stations furnished in hotel lobbies connected to the switchboard attended by the hotel operator shall be provided with coin boxes (post-payment type) provided they are distinctly placarded as hotel telephones so as to be distinguished from the telephone company's regular public telephone station. Stations without coin boxes may be furnished at the hotel desk for the convenience of visitors inquiring for guests
[fol. 65] when restricted to interior use. Any additional facilities that might be required with such stations, such as booths, coin boxes, switchboards, etc., to be furnished and charged the hotel at regular rates.

(c) Trunk lines to central office for use in connection with stations in hotel office and other locations for the exclusive use of hotel management.

Outgoing trunk lines only.

Individual line business unlimited rate.

Tie lines between separate switchboards—See Mileage Rates, Section 3.

Bothway trunk lines to central office for use in connection with stations in guest rooms and lobby and for all incoming messages to be furnished without charge to meet traffic requirements.

The rate for each local exchange message originating at stations in guest rooms and lobby and passing through the hotel private branch exchange switchboard to the central office shall be five cents except that in those cases where the additional service rendered the public at the hotel warrants, a rate of ten cents for each of these local exchange messages may be charged when applied for by the hotel and accepted by the Telephone Company.

The mechanical or electrical design of the private branch exchange will be such that guest room and lobby stations can not be connected to the outgoing trunk lines provided for the exclusive use of the management.

If the switchboard is to be installed outside the primary rate area, see Mileage Rates, Section 3.

Issued: October 2, 1922. Effective: November 1, 1922.

Cancels and supersedes Exchange Rate Schedule effective March 1, 1919.

P. H. Coolidge, General Commercial Superintendent.

[fol. 66] EXHIBIT "D" TO BILL OF COMPLAINT

Findings of Fact, Order, and Opinion

Cases Numbers 4902 and 5344

(Majority Opinion)

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, DIVISION OF PUBLIC UTILITIES

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON ex Rel. THE City of Seattle, The City of Spokane, The City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, The Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY and HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, Respondents,

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Findings of Fact, Order, and Opinion

[fol. 67] History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Women's Civic Club of Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company). [fol. 68] The Department's engineering and accounting staff, was forthwith directed to proceed with and to make, in co-operation with

engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the Mayor, Council or Commission and City Attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and asking co-operation in the investigation.

March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley. These men, together with [fol. 69] our own engineering and accounting staff, worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their pre-war toll rate schedule.

On September 28, 1922, the city of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

On October 5, 1922, the telephone companies filed the toll rate schedules as directed, and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

[fol. 70] Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these, a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to the investigation under way and inviting the writer of the letter or signor of the petition, to be present at hearings subsequently to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first

hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which time all witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Follow- [fol. 71] ing the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26th at Tacoma and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the results of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings, except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

[fol. 72] In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and to the matters to be considered at that time and place.

At the hearings in the cities of Tacoma and Spokane, some thirty-five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel, engineers and accountants.

All the complaints were consolidated for the purpose of hearing and the hearings were joint hearings under the administrative code, requiring a joint decision by the Director of the Department and the Supervisor of Public Utilities and the Supervisor of Transportation.

[fol. 73] From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each).

Findings of Fact

I

Rate Base

Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the state of Washington, including the Spokane Exchange, used and useful in public service, was, as of June 30, 1922, $32,108,853.76, which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of [fol. 74] ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated in an original proceeding.

As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific system just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of a state-wide system and the rates to be [fol. 75] fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

Due consideration has been given to the items "Construction Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Com-ission of Washington, in its order in

Causes 1810-1825, placing a value for rate making purposes upon the properties of the Pacific Telephone and Telegraph Company in the State of Washingtno, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There [fol. 76] appears to be no reason for it to depart from its practice in this case.

Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle, where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account, is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work [fol. 77] in Progress" in the rate base but, as a compensating factor, including in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

"A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the Company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the Company, no consideration is given to the interest earnings of funds employed in construction work in progress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that, if the Company were not permitted

to earn on funds employed in construction work, it must be permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly in the case of Seattle, where an extremely large construction program is now being carried on, [fol. 78] would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the cash required to meet current expenditures. The necessity of an allowance for cash, materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more or less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Funds employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving an earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This cap- [fol. 79] italization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

The rate of return from operations seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construction Work in Progress" in the rate base and to include the interest accretions with operating income, which method acts as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more, and the company if it be less, than the rate of return from operations.

II

Depreciation

Finding

We find that the annual depreciation charge should be reduced from approximately 6 per cent to 3½ per cent for the period of two [fol. 80] years from April 1st, 1923.

Discussion

One of respondents' engineers testified that "depreciation is the sum annually set aside to replace property either worn out or become obsolete in service. In other words, it is the sum that is set aside which, at least theoretically, will keep the plant up to service standard, and keep the dollar whole that is in the business."

Under this view, if a utility investment of one million dollars depreciates in value to $900,000.00, the just amount of depreciation reserve would be $100,000.00.

Stated in another way, the depreciation reserve should at all times approximately equal the difference between the original value and the present depreciated value of the property.

The respondents have not furnished any statement of debits against depreciation reserve segregated as to the State of Washington. In a recent twelve-year period, the amount set aside by the Pacific Telephone and Telegraph Company (not limited to the state of Washington) has been $41,212,207.00. The realized depreciation, or the amount withdrawn from the reserve for replace- [fol. 81] ments, has been $20,137,489.00, leaving a balance of $21,074,718.00 less certain expenditures for extraordinary repairs and other unusual items. In other words, the replacement expenditures have been approximately fifty per cent of the amount set aside for depreciation purposes. In percentage it has been about five per cent per annum, with this company as a whole and slightly more than six per cent in the State of Washington for several years past.

At the close of the year 1914, the balance in the depreciation reserve of the company was $10,369,854.00. Prorating this to State of Washington on the basis of plant values, the balance for Washington was $2,418,457.00. Had the company adopted a three and one-half per cent rate of depreciation at the beginning of the year 1915, and debited the depreciation reserve at the company average of 2.47 per cent, the depreciation reserve as of June 30, 1922, would have been $3,945,493.00, or approximately 16 per cent of the depreciable plant value as of the same date. Taking the actual credits to the depreciation reserve, for Washington, and debiting for current replacements at the above rate of 2.47 per cent the balance in the reserve as of June 30, 1922, should have been $7,711,014.00 or [fol. 82] nearly one-third of the depreciable plant value.

We have found the property of respondents in the State of Washington to be about 85 per cent physical condition.

Under the view expressed by the witness referred to, the depreciation reserve should be approximately 15 per cent of the depreciable property, where the same is found to be 85 per cent physical condition. Had the company accumulated a depreciation reserve at a rate of three and one-half per cent since 1914, the balance would by now be more than 15 per cent as heretofore shown.

In the above calculations we have used the straight line method. If either the sinking fund or annuity method were used by which interest is added to balances, the surplus would be still greater.

The case of "Re Wisconsin Telephone Company" P. U. R. 1922,

B. P. 553, decided by Wisconsin Railroad Commission, involved an application of the telephone company for increased rates in the City of Milwaukee. The facts disclosed that the depreciation reserve balance was about one-third of the fixed capital in the Milwaukee exchange.

[fol. 83] The commission fixed the rate of depreciation at three and one-half per cent. We quote the following:

"It is evident that the credits to this reserve for the Milwaukee exchange since 1909 have been excessive and that a charge to operating expenses equalling three and one-half per cent of the depreciable property would have, so far as experience at present shows, been ample to supply a safe margin to meet losses on property retired from service in the Milwaukee exchange, to which exchange alone this discussion relates. The use of three and one-half per cent for the purpose of this case is based upon the assumption that the company is correct in its claim that the charges to the depreciation reserve in the future will of necessity considerably exceed the charges in the past and during the war period."

In this case the evidence satisfies us that the charges to the depreciation reserve in the future will be less than in the past.

Modern telephone equipment is more durable than that of earlier periods.

The buildings, pole lines, and other construction by respondents have in recent years been of a substantial, durable and expensive type, which will depreciate more slowly than earlier construction, much of which has already been replaced.

[fol. 84] The addition of these high grade units materially increases the rate base upon which the consumer must pay a return and any saving in the way of lessened depreciation should be reflected somewhere in a computation to determine a reasonable rate.

Measured by the facts stated and principles announced in the Wisconsin case supra, the reduction of the depreciation allowance to three and one-half per cent for a test period of two years is amply justified. In the Wisconsin case the reduction was not limited to a specified period.

Another reason which to our mind justifies a trial period is the fact that the Interstate Commerce Commission is now engaged in a study of the problem of depreciation as applied to telephone properties, under the provisions of paragraph (5) of Section 20, of the Interstate Commerce Act.

The first hearing will be held May 1, 1923. The notice of the hearings announces that the straight line, annuity, and sinking fund methods of determining depreciation charges will be investigated. Without conceding that the Interstate Commerce Commission has power to prescribe a method of computing depreciation as applied to telephone properties, which would be binding upon a [fol. 85] state regulatory body in the regulation of purely intrastate traffic, we believe that the results of this investigation will be of immense value in arriving at correct methods of determining de-

preciation and for this reason have limited the rate herein prescribed to a two-year period. The final determination of the I. C. C. should be announced within that time.

We are convinced, that measured by any reasonable rule or theory, the depreciation allowance of the respondents in the State of Washington in the past has been greater than necessary. When the depreciation reserve of any public utility becomes greater than the facts of the particular case justify, we believe it proper for the regulatory body to reduce the depreciation allowance, until the amount of the depreciation reserve reaches a proper level.

We will, therefore, order in this case that the depreciation allowance for the two-year period beginning April 1, 1923, shall not exceed three and one-half per cent per annum on the depreciable property of the respondents.

We are not determining hereby a rate of depreciation to be applied generally, in telephone cases. We are here confronted with the fact that more money has accumulated in this fund than neces- [fol. 86] sary, and we are merely reducing the flow until the proper level is reached.

III

The Four and One-half per Cent Contract Licensee Revenue Dr.

Finding

We find that the Four and One-half per cent Contract between the Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company is wrong in principle, contrary to public policy and the compensation thereunder should be computed on the per station basis rather than a percentage of revenue. We find a reasonable charge per annum for the services rendered under said contract to be 90 cents per station.

Discussion

This is a uniform contract required by the American Telephone and Telegraph Company of all subsidiary companies.

Under this so-called four and one-half per cent contract the respondents are obligated to pay the American Telephone and Telegraph Company four and one-half per cent of substantially all of their gross operating revenue for certain rights and services. We [fol. 87] have no power to prevent any public utility from entering into a contract with a parent company to share with it any portion of its profits. We have the right, however, to say whether such share or any part thereof shall be treated as an operating expense. Even at the risk of differing from our predecessor, The Public Service Commission, we are compelled to say that we are not in sympathy with this kind of business. If the parent company performs any service or furnishes any equipment for which payment should be made, such compensation should be based on the value of the service rendered or the reasonable rental of the equipment fur-

nished rather than upon a percentage of operating revenue. We are opposed to an expense item that arbitrarily increases as the revenue increases.

If an increase in rates is allowed in this case, it means that four and one-half per cent of the increase will accrue to the American Telephone and Telegraph Company, and there is no evidence that such company is in need of additional revenue, and the local company will receive no more from the parent company than it is now receiving. This four and one-half per cent contract has been a "thorn in the flesh" in every community where the respondents operate. It [fol. 88] gives rise to suspicions of concealment and dishonesty in every hearing in which it is involved. Not having power to annul it, we believe the respondents and the American Company owe it to the public to wipe it out and put their dealings with the parent company on the basis of actual value of the service rendered and on a plane that is understandable to the average citizen. However innocent or meritorious it may be in fact, this contract is an endless source of controversy and misunderstanding. The American Telephone and *Telephone* Company has in its employ trained and skilled experts who appear at hearings in which this contract is questioned and present skillful expositions of its provisions, and undertake to justify its existence, and yet public distrust of it has increased rather than diminished. We are aware that some courts and commissions have given it their endorsement but after careful consideration we cannot do so. We believe that a utility that has a proper appreciation of the elements that establish wholesome public relations should take steps to remove such a proven source of discord.

In the case of "In re Michigan State Telephone Company P. U. R. 1923-A, page 764," decided by the Public Utilities Commission of [fol. 89] Michigan less than a year ago, the Commission said: "The four and one-half per cent contract between the American Telephone and Telegraph Company and the Michigan State Telephone Company is not a contract between corporations dealing at arms length but one between the superior and the inferior—a controlling and a controlled company—the parent company and its subsidiary—the parent company and its Child. The contract is in effect a contract made by the American Telephone and Telegraph Company as proprietor with the agents of itself as owner of the stock of the Michigan State Telephone Company. The directors and officers of the Michigan State Telephone Company are its directors and officers because they are made so by a vote of the American Telephone and Telegraph Company as stockholders of the Michigan State Telephone Company."

The Commission further states: "In this case the directors and officers of the Michigan State Telephone Company are elected, directed, influenced and controlled by the American Telephone and Telegraph Company. They exercise not their own judgment and discretion but the judgment and discretion of the American Telephone and Telegraph Company which made and may unmake them. [fol. 90] Under the law of this state the four and one-half per cent contract is at least presumptively void."

Substantially the same relations exist between the respondents in this case and the American Telephone and Telegraph Company as existed between the Michigan Company and the American Company. In the same case the Michigan Commission further states:

"Conceding the invalidity of the four and one-half per cent contract, the American Telephone and Telegraph Company is entitled to be reimbursed for the cost of services performed by it for the Michigan State Telephone Company and to have the integrity of its property used by the Michigan State Telephone Company maintained."

The Commission then proceeds with an exhaustive analysis of the services rendered by the American Telephone and Telegraph Company which are substantially similar to those rendered under a like contract with the respondents in this case, and concludes that ninety cents per station is a just allowance therefor. The respondents in this case have 179,614 stations. Ninety cents per station would amount to $161,653. The amount called for by the four and one-half per cent contract on existing rates is $388,365. In other words, the Michigan Commission makes an allowance of something [fol. 91] like two per cent instead of four and one-half per cent as provided in the contract. Without going into a further discussion of the value of the services and privileges paid for by the four and one-half per cent fixed in this contract, we will allow 90 cents per station as an operating expense and disallow the remainder.

A few months ago the Nebraska State Railroad Commission in the case of Re Northwestern Bell Telephone Company, 1923 P. U. R. (Adv. Sheets) p. 165, speaking of this contract said: "Considering the question here discussed it appears to us that the basis of charge as provided in the contract is fundamentally wrong and condemned specifically by the Supreme Court of the United States. The company applies the percentage to certain gross revenues received by the applicant. The more revenues the more the charge against revenues for the benefit of the American Company, which method of calculation constitutes a circle,—the more the rates the more the charge, ad infinitum."

In the Minnesota Rate case (Simpson v. Shepard), 230 U. S. 232, Mr. Justice Hughes used the following language:

"The value of the use as measured by rate cannot be made the criterion when the rate itself is in question."

[fol. 92] In the case of the City of Houston v. Southwestern Bell Telephone Company etc., U. S. Supreme Court Advance Opinions 1921-22, No. 16, July 1, 1922 p. 539, is cited by respondents as supporting the contract, but the opinion clearly states that the fact that one company owns stock in another "requires close scrutiny of their dealings to prevent imposition upon the community served by the company."

We have tried to give close scrutiny to this contract and have reached the conclusion heretofore stated.

Even if an allowance equal to two and one-half per cent is made

as an operating expense under this contract the results would not differ materially.

The Pacific Company assigns as a reason for not disturbing this contract that the American Telephone and Telegraph Company and its subsidiary concerns have builded their business and accounting methods upon it. In our opinion if this be true they have builded unwisely on a crumbling foundation.

[fol. 93]

IV

Machine Switching Project

Finding

We find that the installation of machine switching in Seattle is justified.

Discussion

Machine switching has been installed to replace manual operation in three of the offices of the City of Seattle. Three other offices will be converted to machine switching in the near future. The testimony of respondents' experts is not clear as to what saving in expense, of any, will be made by the substitution of automatic for manual operation. We are satisfied, however, that a material economy will be brought about by the installation of machine switching. In addition to the somewhat unsatisfactory testimony upon this point, we cite an article by a recognized authority on such matters, in Vol. 38, Part 2, of the American Institute of Electrical Engineers page 1571, where the following statement appears:

"Telephone exchanges must pay their way. If automatic exchanges do not pay, there would not be any of them left in existence today, for this movement is twenty-seven years old. Five exchanges [fol. 94] formerly manual were converted to automatic. They range in size from 2,300 lines and 4,400 telephones to 38,000 lines and 44,000 telephones. The totals for the five were 47,000 lines and 65,000 telephones. The comparison of expenses is as follows:

	Manual	Automatic
Total operating and maintenance expenses per year	$552,600.00	$136,800.00
Average per line per year	11.77	2.92
Average per telephone year	8.50	2.11

In other words, the operating and maintenance expenses of automatic operation in the case of these five exchanges were about one-fourth the operating and maintenance expenses of manual operation. We do not anticipate such favorable results in a multi-office exchange such as Seattle, but a material saving should ultimately result. The automatic devices used in the five exchanges above referred to are not those of the Western Electric Company, as installed in Seattle, but it is safe to assume that the Western Electric machine

switching devices are superior from the standpoint of economy and efficiency. They are a later and somewhat costlier product, and we [fol. 95] assume that a concern such as the Pacific Telephone and Telegraph Company would not install a device of inferior type.

We must therefore conclude that the installation of the machine switching devices in Seattle will on the whole reduce the company's expenses, and our conclusions and order in this case will be made with that assumption in view.

In arriving at this conclusion we have taken into consideration the greater fixed charges which will accrue on the automatic system by reason of the greater capital outlay.

In addition to financial economies, the installation of machine switching to replace manual equipment is further justified for the following reasons:

1. Speed of connection and disconnection.

2. Ease of obtaining connection and disconnection.

3. Accuracy of connection.

4. Voice transmission.

5. Secrecy.

There is also the elimination of some of the faults inherent in manual operation such as

1. Fluctuations in service.

2. Impairment of service by epidemics, strikes, etc.

[fol. 96] 3. The mistranslation of calling subscribers' desires.

V

Return

Finding

The rate of return to be realized under existing rates and by application of the proposed increased rates, is shown in the following income statement adjusted to meet the views heretofore expressed in relation to depreciation allowance and the four and one-half per cent contract.

Statement of Operating Income and Rate of Return

Estimate for Year 1923

Revenues

	Present rates	Proposed rates
1. Exchange Service Revenues ..	$6,642,437.00	$8,434,253.00
2. Toll Service Revenues	2,350,000.00	2,732,358.00
3. Miscl. Operating Revenues ..	308,004.00	308,004.00
4. Total Tel. Oper. Revenue.....	$9,300,441.00	$11,474,615.00

Expenses

	Present rates	Proposed rates
5. Ordinary Repairs	$1,514,153.00	$1,514,153.00
6. Station Removals & Changes	267,385.00	267,385.00
7. Depreciation	1,070,937.00	1,070,937.00
8. Traffic Expense	2,642,731.00	2,642,731.00
9. Commercial Expense	865,011.00	865,011.00
10. General & Miscl. Expense	234,659.00	234,659.00
11. Rents	79,950.00	79,950.00
[fol. 97]		
12. Uncollectible Revenues	35,618.00	48,367.00
13. Taxes	485,617.00	658,057.00
14. Licensee Revenue—Dr.	161,653.00	161,653.00
15. Total Tel. Oper. Expense	$7,357,714.00	$7,542,903.00
16. Operating Income	$1,942,727.00	$3,931,712.00
17. Int. during Constr.—Accrued	148,122.00	148,122.00
18. Adjusted Operating Income	$2,090,849.00	$4,079,834.00
19. Rate Base	$34,789,635.00	$34,789,635.00
20. Per Cent Earned	6.01	11.73

NOTE.—The rate base above is the estimated average plant value for year 1923, plus working capital.

Discussion

Without calculating any saving by virtue of the installation of machine switching, it is seen that the return under existing rates is approximately 6 per cent.

Whatever saving can be made through the machine switching program, which we feel will soon be substantial, will serve to increase the returns.

If income statements were prepared for several years past adjusted as above, they would show a fair rate of return.

VI

Existing Rates

Finding

We find that the existing rates are just, fair, reasonable and sufficient.

[fol. 98]

VII

Proposed Rates

Finding

We find that the proposed increased rates both toll and exchange, are unjust, unfair, unreasonable, and more than sufficient.

VIII

Decrease in Rates

Finding

The evidence does not justify any reduction in rates at this time.

IX

Reparation

Finding

The contention made by the City of Seattle for reparation is not supported by the facts or the law and that portion of the complaint should be dismissed.

Petitions to Reopen Case

Some two weeks subsequent to the conclusion of all of the hearings in this case, the Seattle Chamber of Commerce, the Port of Seattle [fol. 99] and the County Commissioners of King County, Washington, filed with the Department petitions requesting the reopening of this case. The time for the suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the conclusions we have reached the petitions to reopen the case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue the same is hereby dismissed.

Discussion

This Department has had many disagreeable tasks to perform. During the war period the rising cost of labor and materials made it necessary for us to allow increased rates to many utilities to save them from bankruptcy. In almost every decision we held out a hope [fol. 100] if not a promise that when conditions returned to normal and the period of inflation had passed rates would come down. Many utility rates have been reduced, some voluntarily and some by order of this Department, but now come the respondents when we had dared hope that our predictions might be realized and ask for a startling increase. We have sought to pursue a straightforward course doing justice to the utilities and the public regardless of pop-

ular clamor. During the war period the Postmaster General increased the rates of respondents during Federal control. These rates automatically expired and the former rates became revived by the return of the telephone lines to private ownership. Our predecessor, the Public Service Commission, permitted the refiling of the so-called Burleson rates upon one day's notice and they have been in effect ever since though the prices of materials and labor have steadily decreased. The commission was condemned by the press and public for permitting the continuance of these rates. The State of Oregon and other states refused to sanction the Burleson rates and the general telephone rate level has been higher in the State of Washington than in adjoining states until recently. We believe the commission acted wisely in continuing the so-called Burleson rates. [fol. 101] If we were convinced that the increases now sought by respondent were necessary and warranted by all facts we would permit them and submit to any censure that would follow with the patience that regulatory bodies must in the nature of things exhibit, but we are not so convinced.

Order

Wherefore it is ordered:

1. That the applications of respondents for increased rates be and the same are hereby denied. That the proposed increased rates in their entirety be and are hereby permanently suspended; that the same shall not become effective, and existing rates shall remain in effect until the further order of the Department.

2. That the annual depreciation allowance be and the same is hereby fixed at three and one-half per cent on the depreciable property of respondents for the period of two years beginning April 1, 1923.

3. That the compensation to be paid the American Telephone and Telegraph Company under said four and one-half per cent contract shall hereafter be computed on the basis of 90 cents per station per annum on the average number of stations.

[fol. 102] 4. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be and the same is hereby dismissed.

5. That the portions of the complaints seeking reparation or reduced rates be and they are hereby dismissed.

Witness, The Department of Public Works of Washington this 31st day of March, 1923.

The Department of Public Works of Washington, By E. V. Kuykendall, Director. Frank R. Spinning, Supervisor of Transportation. Attest: J. H. Brown, Secretary.

[fol. 103] EXHIBIT E TO BILL OF COMPLAINT

Dissenting Opinion

Cases Numbers 4902 and 5344

Dissenting Opinion

For the first time in our association as members of the Department of Public Works of Washington, formerly the Public Service Commission of Washington, my associates and myself have been unable to agree upon a final order.

The majority opinion in this case contains conclusions upon certain fundamental principles of telephone rate regulation to which I cannot subscribe, and which are wholly at variance with my own conclusions.

In my opinion the record in this case fully sustains the conclusions which are expressed in the minority opinion filed herewith.

Dated at Olympia, Washington, March 31, 1923.

Hance H. Cleland, Supervisor of Public Utilities.

[fol. 104] Before the Department of Public Works of Washington, Division of Public Utilities

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, ex Rel. The City of Seattle, the City of Spokane, the City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, the Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY and HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, Respondents

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

FINDINGS OF FACT, ORDER, AND OPINION

[fol. 105] History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Women's Civic Club of Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them

that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company).

The Department's Chief Engineer, H. J. Flagg, and its engineering and accounting staff, together with Mr. W. W. Hardinger, a con- [fol. 106] sulting telephone engineer with twenty-seven years' experience in the construction, operation and engineering of independent telephone properties employed, by the Department as a special engineer, were forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the Mayor, Council or Commission and City Attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and, that it being a case of unusual magnitude, it was the desire of the Department that the city authorities and their local commercial and other public and civic bodies and organizations co-operate with us in this work, rendering such aid or assistance as possible. These letters and complaints were mailed to the authorities of more than one hundred cities and towns.

[fol. 107] On March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal. Subsequently, and on or about March 31, 1922, the City of Seattle employed Mr. T. E. Phipps, an experienced rate and valuation engineer, with whom was associated in the preparation of this case Mr. E. D. Ridley, a well-qualified public utility auditor and accountant.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley, above mentioned. These men, together with our own engineering and accounting staff, worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

Mr. Ridley and Mr. L. P. Hockett, utility engineer and accountant for the Department, spent several months in San Francisco checking the books, records and accounts of the companies. A thorough check, examination and survey was made in the State of Washington, [fol. 108] particularly at Seattle, Spokane and Tacoma. In addition thereto a check and examination of the books, records and accounts of the American Telephone and Telegraph Company in New York and of various companies (including many independent telephone companies) in the reports and records of the Interstate Commerce Commission in Washington, D. C., was made.

On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their prewar toll rate schedule.

On September 28, 1922, the City of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

On October 5, 1922, the telephone companies filed the toll rate schedules as directed, and concurrently therewith filed with the De- [fol. 109] partment a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these, a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to the investigation under way and inviting the writer of the letter or signer of the petition, to be present at hearings subsequently to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all [fol. 110] witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Following the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26th at Tacoma

and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the results of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings, except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or [fol. 111] commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and to the matters to be considered at that time and place. The greater part of these notices were sent to business and professional men in the City of Seattle from whom the greater number of complaints had been received; and it may be interesting to note that although some 2,300 notices of hearings and personal letters were written to these complainants in the City of Seattle, there were (other than attorneys, engineers and accountants appearing directly for parties of record) only seven persons present at the Seattle hearing who offered any statement whatever upon the subject under investigation and consideration and the only proof offered by these persons was a comparison between their monthly or yearly bills under the old [fol. 112] rates and what their bills would be under the company's proposed rates. Of the number who received at least three direct and personal notices and communications concerning the investigation and hearings, many were members of the Seattle Chamber of Commerce, namely one hundred and eight, and at least two were officers of that organization.

At the hearings in the cities of Tacoma and Spokane, some thirty-five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel, engineers and accountants.

The investigation and hearings in this case have been the most comprehensive ever made by the Public Service Commission or the Department of Public Works of Washington, and have extended over a period of fourteen months, during the greater part of which time the Department has been assisted by the engineers and accountants for the cities, who have worked in the spirit of closest co-operation. The Department, through authority vested in it by law, has made available to all parties, all records, books, papers, documents,

[fol. 113] data and statistics found in the records of both companies, and has in all cases supplied the engineers and accountants for the cities with all data, records, etc., collected by it from all sources. In fact, the entire investigation and proceeding has been so conducted that (if we may take the liberty of quoting from an interview published in a Spokane paper) Mayor Charles A. Fleming and Corporation Counsel James M. Geraghty of Spokane stated that they were much pleased with the showing made by the engineering experts employed by the state and the city in opposition to the proposed increase in telephone rates, and that the atmosphere prevailing was something entirely different from anything encountered in former hearings; that the officials of the State Department of Public Works showed a spirit of co-operation with Spokane and Seattle, and a determination to make a thorough investigation into the telephone situation before taking action.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each).

[fol. 114] Findings of Fact

I

Rate Base

Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the State of Washington, including the Spokane Exchange, used and useful in public service, was, as of June 30, 1922, $32,108,853.76, which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated as an original valuation proceeding.

[fol. 115] As to the balance of the Pacific Company's plant in Washington, it is merely the bringing up to date of a valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific

Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific system just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of a state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

[fol. 116] Due consideration has been given to the items "Construction Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Commission of Washington, in its order in Causes 1810-1825, placing a value for rate making purposes upon the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case.

[fol. 117] Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle, where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base but, as a compensating factor, includ-

[fol. 118] ing in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

"A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the Company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the Company, no consideration is given to the interest earnings of funds employed in construction work in progress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that, if the Company were not permitted to earn on funds employed in construction work, it must be permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

[fol. 119] Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the case required to meet current expenditures. The necessity of an allowance for cash, materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more nor less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Certainly, funds employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving an earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant [fol. 120] changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

The rate of return from operations seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construction Work in Progress" in the rate base and to include in operating in-

come the interest accretions which act as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more, and the company if it be less, than the rate of return from operations.

II

Rate of Return—(Earnings)

Finding

That under the rates applicable during the past seven years the [fol. 121] Pacific Telephone and Telegraph Company in the State of Washington, after paying operating expenses, taxes, licensee revenue debtor, and setting aside depreciation, has shown an annual rate of return as follows:

1915	1916	1917	1918	1919	1920	1921	1-1-to 6-30-22	
1.84%	3.40%	3.31%	3.13%	4.67%	4.09%	3.52%	3.35%	(annual)

and that said rate of return during the entire period has been unfair, unjust unreasonable and less than sufficient.

That the estimated rate of return of the Pacific Telephone and Telegraph Company for the State of Washington for the year 1923 under the rates proposed by the companies, computed upon the rate base herein found, will be 9.04%, which would be unjust, unfair, unreasonable and more than sufficient.

That under the rates fixed and allowed by this order, the rate of return will be 7.37% upon the rate base herein established.

Discussion

It has been a consistent policy of the present members of this Department in all rate cases, where satisfactory service was shown to have been given, to allow a rate of return approximating 8% upon [fol. 122] the value or rate base as fixed and determined by the Department. It is admitted by counsel for the City of Seattle that the service is satisfactory. The only direct testimony upon this subject was that of a witness for the City of Seattle, who stated that 8% was a fair rate of return upon money invested in telephone plant. As testified on cross-examination by certain witnesses (telephone users) for the City of Tacoma, a rate of return ranging from 6% to 10% was by them deemed reasonable, should they invest their money, depending upon the nature or class of business in which the investment was made.

For convenience of study, and to make the manner and method of computation clear, there is here inserted an income statement for the years 1920, 1921 and the first six months of 1922. We will define and discuss each of the items therein. The numbers refer to the corresponding account title on the statement.

[fol. 123] Statement of Operating Income and Rate of Return, Pacific System, State of Washington

	1920	1921	January 1 to June 30, 1922
1. Telephone Operating Revenues	$7,754,052.82	$8,114,245.13	$4,165,420.49
Deductions from Revenues:			
2. Telephone Operating Expenses (excl. Dep.)	4,716,709.05	5,043,458.88	2,573,994.76
3. Taxes Assignable to Operations	600,045.53	543,449.27	262,310.90
4. Uncollectible Operating Revenues	17,321.26	29,028.68	17,061.75
5. Depreciation (on Depreciable Property)	1,177,558.87	1,321,585.78	727,295.13
6. Licensee Revenue—Dr.	327,106.58	342,658.03	173,421.04
7. Total Deductions from Revenue	$6,838,741.29	$7,280,180.64	$3,754,083.58
8. Operating Income	915,311.53	834,064.49	411,336.91
9. Interest during Construction	17,959.48	90,491.52	97,965.71
10. Adjusted Operating Income	$933,271.01	$924,556.01	$509,302.62
11. Rate Base (Incl. C. I. P.)	$22,821,159.54	$26,232,691.37	$30,425,113.89
12. Rate of Return	4.09%	3.52%	3.35%

NOTE.—Line 11—Amounts are average for the period hence do not agree with rate base finding since the latter is of a specific date, namely June 30, 1922.

[fol. 124] 1. Telephone Operating Revenues.—This the total annual revenue arising from the conduct of the telephone business. From this amount, and before any balance is available for the payment of dividends or interest on bonds or other obligations, there is properly deductible Items 2, 3, 4, 5 and 6.

2. Telephone Operating Expenses (Excluding Depreciation).—This item includes salaries, wages, materials, and all other expenses of operating a telephone plant, except those covered by Items 3, 4, 5 and 6. No interest of any kind is included in any of the items deductible from Telephone Operating Revenues.

3. Taxes Assignable to Operations.—This item includes all federal, state, county and municipal taxes paid by the telephone company.

The department has heretofore consistently refused the allowance of income tax in all utility matters coming before it. However, in view of recent decisions of the Supreme Court of the United States, federal courts and the Interstate Commerce Commission, we are constrained to reverse our former holding and practice in this regard, and to follow the law as definitely settled by the courts, which is, that Federal income tax is properly deductible from operating reve-
[fol. 125] nues.

Consolidated Gas Company of New York vs. Newton, 267, Federal 231.

Newton vs. Consolidated Gas Company, 42 Sup. Ct. 264.

Galveston Electric Company vs. Galveston, 66 Law Ed. 382.

Reduced Rates 1922, — I. C. C. 683.

4. Uncollectible Operating Revenue.—This item includes the charges for telephone and other services, which, after a reasonably diligent effort to collect, have proved impracticable of collection. Only uncollectible bills for amounts which have been treated as operating revenues (see above) are included in this account.

5. Depreciation (on Depreciable Property).—Under the system of accounts prescribed by the Interstate Commerce Commission and adopted by the Department of Public Works, telephone companies operating in the State of Washington are required to establish and include in their yearly and monthly operating expenses, a charge sufficient to cover depreciation of plant due to wear and tear, obsolescence, inadequacy, public demand, extraordinary accidents, catastrophes, etc. These charges are carried to a depreciation reserve, and [fol. 126] the costs of all replacements of plant units, instead of being included in the ordinary repairs accounts, are charged against the depreciation reserve. Owing to the fact that the annual depreciation charge must be estimated, there naturally have been some slight differences of opinion as to just how this annual charge should be estimated, and just about what percentage of plant cost it should be. It is apparent that while the percentage necessary in the case of one exchange may vary to some extent from the percentage necessary in the case of another exchange, due to a possible difference in the char-

acter of the physical property contained in each; yet at the same time, there should be no material differences in the annual charges necessary for large telephone systems, involving a number of exchanges, large and small, in different portions of a state, where climatic and other conditions are not the same.

The question here involved and to be determined, is as to what reasonable annual percentage should be allowed for depreciation of respondent's plant in this state.

In computing the rate of return, in all statements found herein, annual depreciation has been allowed at a percentage of 5.25%.

[fol. 127] The subject of depreciation was covered fully by witnesses for the companies, for the Department and for the City of Seattle, and the percentages recommended by each were as follows:

Companies	5.75%	
City of Seattle	5.88%	(exchange plant only).
Department's Engrs	5.25%	

In Case No. 4747, Public Service Commission of Washington et al. vs. Pacific Telephone and Telegraph Company, decided February 13, 1919, the Public Service Commission of this state approved depreciation for the company at an annual percentage of 5.72%, and 5.72% was the percentage allowed by agreement with the Federal Government during the period of Federal control of the telephone systems of the United States.

In addition to our finding of depreciation at 5.72% in Cause No. 4747, depreciation percentages were allowed by us in the following cases:

Cause No. 5040, City of Port Angeles vs. Angeles Telephone and Telegraph Company, Nov. 17, 1920, 5.72%.

Cause No. 5076, Camas Commercial Club vs. Camas Telephone and Telegraph Company, February 1, 1921, depreciation allowed 6%.

[fol. 128] Cause No. 5127, Commission vs. Oregon-Washington Telephone Company, January 4, 1921, rate not stated in order, but 5.72% found in working papers.

There is included herein a tabulation of decisions on depreciation by commissions and courts. There are 112 commission decisions and eight court decisions.

It is found from an analysis of these decisions that the rates for depreciation fixed by the regulatory bodies generally were considered to apply to the property as a whole, either to the total actual cost or the total reproduction cost, or to the total value. The percentages allowed range from a minimum of 2.29% to a maximum of 10%. In twelve of the cases, the allowance was below 5%; in fifty cases the percentage was from 5% to 6%; in forty cases the percentage was from 6% to 7%, while in ten cases the allowance in excess of 7%. The average allowance was 5.972%. It will also be noted that in ninety of the 112 cases reported, the depreciation allowance fell between 5% and 7%.

[fol. 129] Tabulation of Cases on Depreciation

Jurisdiction	Citation		Rate fixed
Alabama	PUR1919B	791	5.50
Arizona	PUR1920B	411	6.00
Arkansas	PUR1921B	516	6.40
California	PUR1915F	1014	5.50
California	PUR1922A	853	5.50
California	PUR1922C	97	3.28
Colorado	PUR1917B	198	5.65
Georgia	PUR1921C	833	5.11
Hawaii	PUR1921B	209	6.80
Idaho	PUR1916C	438	6.07
Idaho	PUR1920E	321	6.00
Illinois	PUR1915D	646	5.00
Illinois	PUR1916B	318	7.00
Illinois	PUR1916D	781	6.58
Illinois	PUR1917A	658	6.00
Illinois	PUR1917B	368	6.00
Illinois	PUR1918B	172	5.50
Illinois	PUR1918E	74	5.50
Illinois	PUR1915E	23	5.50
Indiana	PUR1917F	209	4.50
Indiana	PUR1918C	489	5.00
Indiana	PUR1918E	859	5.00
Indiana	PUR1918E	669	5.00
Indiana	PUR1920C	209	5.00
Indiana	PUR1920C	854	5.00
Indiana	PUR1919E	504	5.00
Indiana	PUR1920A	422	5.00
Indiana	PUR1920B	813	5.00
Indiana	PUR1920D	83	5.00
Indiana	PUR1922E	46	5.00
Kansas	PUR1915B	507	6.00
Kansas	PUR1918C	55	6.50

[fol. 130]

Kansas	PUR1918C	777	5.72
Kansas	PUR1922A	321	4.36
Louisiana	PUR1922E	86	5.00
Maine	PUR1920C	386	3.32
Maryland	PUR1916C	925	6.25
Michigan	PUR1921C	545	5.00
Michigan	PUR1921E	308	5.00
Michigan	PUR1923A	30	4.00
Minnesota	PUR1916C	141	8.94
Minnesota	PUR1921C	733	4.50
Missouri	PUR1915C	366	6.50
Missouri	PUR1920E	59	7.00
Missouri	PUR1919A	659	5.50

Jurisdiction	Citation		Rate fixed
Missouri	PUR1922A	773	6.00
Nebraska	PUR1915E	57	6.00
Nebraska	PUR1919A	35	6.00
New Hampshire	PUR1918F	592	7.00
New York	PUR1916B	940	5.80
New York	PUR1920D	529	5.66
North Dakota	PUR1921E	567	6.00
North Dakota	PUR1922E	602	5.00
Ohio	PUR1922A	155	5.00
Oregon	PUR1915F	290	2.39
Oregon	PUR1919D	345	3.55
South Dakota	PUR1915A	562	7.00
South Dakota	PUR1915B	223	7.00
South Dakota	PUR1915E	516	6.00
South Dakota	PUR1916A	364	7.00
South Dakota	PUR1916D	603	6.00
South Dakota	PUR1919B	734	7.00
South Dakota	PUR1922D	769	4.00
Utah	PUR1919C	566	6.50
Virginia	PUR1922A	756	5.50
West Virginia	PUR1921B	97	6.10
Wisconsin	2WRCR	105	3.67
Wisconsin	2WRCR	358	8.00
Wisconsin	2WRCR	427	10.00
Wisconsin	2WRCR	546	7.00
Wisconsin	3WRCR	117	8.00
Wisconsin	3WRCR	412	8.00

[fol. 131]

Wisconsin	3WRCR	452	8.00
Wisconsin	4WRCR	1	8.00
Wisconsin	4WRCR	259	7.50
Wisconsin	4WRCR	370	7.00
Wisconsin	4WRCR	407	7.00
Wisconsin	4WRCR	414	7.00
Wisconsin	6WRCR	211	8.00
Wisconsin	6WRCR	419	6.50
Wisconsin	6WRCR	549	6.50
Wisconsin	6WRCR	573	6.50
Wisconsin	7WRCR	428	7.00
Wisconsin	7WRCR	608	7.00
Wisconsin	8WRCR	92	6.50
Wisconsin	9WRCR	383	6.50
Wisconsin	9WRCR	489	6.07
Wisconsin	11WRCR	180	6.50
Wisconsin	11WRCR	402	7.00
Wisconsin	11WRCR	499	6.50
Wisconsin	11WRCR	666	6.52
Wisconsin	13WRCR	540	6.50

Jurisdiction	Citation		Rate fixed
Wisconsin	14WRCR	157	7.00
Wisconsin	14WRCR	594	6.50
Wisconsin	15WRCR	182	9.00
Wisconsin	15WRCR	552	7.00
Wisconsin	16WRCR	402	6.67
Wisconsin	16WRCR	473	6.50
Wisconsin	16WRCR	758	7.00
Wisconsin	PUR1916C	1020	5.00
Wisconsin	PUR1916D	631	6.50
Wisconsin	PUR1917A	439	5.17
Wisconsin	PUR1917C	507	5.50
Wisconsin	PUR1917E	540	6.00
Wisconsin	PUR1919D	909	6.00
Wisconsin	PUR1920C	1019	6.00
Wisconsin	PUR1921E	171	4.58
Wisconsin	PUR1922A	164	6.00
Wisconsin	PUR1922B	91	5.00
Wisconsin	PUR1919F	92	5.21
Wisconsin	PUR1922B	553	3.50
Wisconsin	PUR1922D	368	5.00

[fol. 132] The following court decision also discuss the matter at some length:

Pioneer Telephone Company, Oklahoma, 118 Pac. 363.
Railroad Company v. Richmond, 96 U. S. 521.
Munn v. Illinois, 94 U. S. 133.
Cumberland Telephone and Telegraph Company v. Louisville 187 Federal, 637.
Cumberland Telephone and Telegraph Company v. Memphis, 183 Federal, 875.
Cumberland Telephone and Telegraph Company v. Railroad Commission, 156 Federal 823.
Gome Telephone and Telegraph Company v. Carthage, 139 S. W. 547.
Bell Telephone Company v. Houston, Texas, P. U. R. 192D, 793.

6. Licensee Revenue Debtor (4½% Contract).—This is a contract between the American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane whereby the Pacific Company and the Home Company pay to the American Company four and one-half per cent of the gross revenue from four principal classes of service, namely; 1st, Subscribers' Station Revenue: 2nd, [fol. 133] Public Pay Station Revenues; 3rd, Private Exchange Line Revenues, and 4th, Message Toll Revenues; less Uncollectible Operating Revenues. The total amount paid by the Pacific Company and the Home Company under this contract in the year 1921 was $342,658.03. The consideration for this payment is that the

American Telephone and Telegraph Company supplies at all times to the Pacific Company and the Home Company certain instrumentalities, services, etc. These instrumentalities and services may be briefly designated as follows:

1. Telephone transmitters, receivers and induction coils.

2. Rights under all patents owned or controlled by the American Company covering use of telephonic devices, apparatus, methods and systems.

3. The right to use all standarized, new and improved apparatus and methods developed through research and experimental work by the American Company.

4. A guarantee of freedom from royalties, damages and expenses on account of patents arising out of recommended use of apparatus, methods and systems.

[fol. 134] 5. An organization to prosecute continuously the fundamental work of research and investigation to the end that safety, economy and efficiency in the business will be promoted

6. Advice and assistance in general engineering, plant, traffic, operating, commercial, accounting, patent, legal, administrative and other methods involved in the efficient, economical and successful conduct of the telephone business.

7. Advice and assistance in the financing necessary to develop and enlarge the plants of the Pacific and the Home Companies.

8. Assistance, co-operation and support in promoting the health and welfare of the employes, including the plan for employes' pensions, disability benefits and death benefits with a provision for guaranteeing the integrity of the funds provided by the Pacific and Home companies for this purpose.

Instrument Service (Receivers, Transmitters and Induction Coils).—It is conceded in this case, by all parties, that, should the only service performed by the American Company be the so-called instrument service, the annual charges therefore which might prop-
[fol. 135] erly be allowed as a deduction from revenue would be in excess of 53 per cent of the total amount paid by respondents to the American Company under the four and one-half per cent contract. This particular item is referred to in the record and the briefs as "instrument service."

Other Services.—In our opinion, the cost to the Pacific Company and the Home Company of the other items of service, etc., rendered by the American Company to them would greatly exceed the other 47 per cent of the amount paid under the contract. It is our opinion that the value of the services rendered by the American Company exceeds the amount paid therefor, and we, accordingly, allow the full amount charged therefor as a deduction from revenue. However, it is also our opinion that the method used in computing

the compensation to be paid for these services is not correct in principle. As it is now a revision of rates resulting in a change in revenue brings about a corresponding change in the amount in dollars to be paid under the contract. In other words, having found that four and one-half per cent of certain gross revenues under existing rates is just and equitable, it can not logically be said that four and one-half per cent of the revenues derived from increased rates is also [fol. 136] fair without some showing of additional facilities furnished or services rendered by the American Company. We believe that a method of computing the payments under the contract which will not be influenced proportionately by changes in operating revenues can be found. Such a method would be more equitable and less objectionable than the present flat percentage method. We are, therefore, adopting a method of determining the amount of compensation which should be paid, which we believe will accomplish that end and at the same time be fair to the companies and to their patrons. Naturally, as an exchange or a plant increases there will be a greater demand for instrumentalities and service and this demand will grow as the size and importance of the exchange increases or grows. Therefore, in our opinion, the only fair and logical method of fixing and standardizing this compensation is upon a per station basis. We believe that the present compensation in dollars is reasonable for the service rendered and should be approved. Dividing the contract payment for 1922 by the average number of exchange stations served by respondents a figure of $2.15 per station is derived. Therefore in this case the amount of compensation for [fol. 137] services performed under this contract that is approved as a deduction from revenue is computed at the rate of $2.15 per exchange station. The total approved allowance for this compensation is not changed by the increase in rates allowed.

The four and one-half per cent contract has been the subject of investigation by practically every public service commission or similar regulatory body in the United States, and it is of interest to note that the full four and one-half per cent has been allowed by twenty-one commissions, and that the amount has been reduced by only seven commissions. Ten state commissions have not only allowed the full amount under the contract but have approved the percentage method of computing compensation. Eleven states, although they have allowed the full amount, have not approved the percentage method.

The contract has been the subject of exhaustive investigation by the Public Service Commission of this state as far back as the year 1912 and we have in our files as a result of the first investigation two volumes of some 540 pages of testimony and exhibits relating thereto. At that time two members of the Public Service Commission of this state held an inquiry in New York City, the home office of the Amer- [fol. 138] ican Telephone and Telegraph Company, and inquired into every conceivable angle of the subject.

This matter was before the Public Service Commission of this state in our Cause No. 4747 Public Service Commission, et al. v. Pacific Telephone and Telegraph Company and the Postmaster

General, and in the decision (1919 annual report, page 168) we find the following:

"At a large expense this Commission several years ago made a thorough investigation of this contract, but at that time entered no order concerning it. We have reached the conclusion that it is a beneficial arrangement conducive to telephonic development and service. A number of other state commissions have analyzed and discussed it and in the main have supported it."

And again in that same order, we find the following:

"Between the Bell System and its constituent companies there has for many years existed what is known as the four and one-half per cent (4½%) contract. This contract is recognized and made a part of the agreement between the Bell system and the constituent companies joining and the Postmaster General."

The Supreme Court of the United States, in City of Houston v. Southwestern Bell Telephone Company and Southwestern Bell Tele- [fol. 139] phone Co. v. City of Houston et al., U. S. Supreme Court Advance Opinions 1921-22, No. 16, July 1, 1922, p. 539, stated:

"The American Telephone and Telegraph Company owns substantially all of the stock of the Company and a large majority of the stock of the Western Electric Company. From the American Telephone and Telegraph Company the Company leases its instruments and secures their maintenance and renewals, and from the Western Electric Company it obtains the greater part of its equipment and supplies used in operating its local exchange. It is contended by the City that no fair disclosure was made of the profits made by the furnishing companies on the instruments and on the material and supplies so furnished, and that, for this unique reason, the Company should not be heard in a court of equity and the case should be dismissed. It is true that the Company did not introduce proof to show what the profits of the two companies were, either upon the business done with it or on their entire business; but it did introduce much evidence tending to show that the charge made and allowed for the services rendered and supplies furnished by them was reasonable and less than the same could be obtained for from other sources. Under the circumstances disclosed in the evidence, the fact that the American Telephone and Telegraph Company controlled the Company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of their dealings to prevent imposition upon the community served by the [fol. 140] company, but the Court recognized and applied this rule."

Although there are many Commission decisions, whereby the four and one-half per cent contract is discussed in detail, and approved, as above indicated, we think it necessary to quote from only one of these decisions, as bearing upon the reasonableness of the compensation paid for the services rendered.

We quote from a decision of the Commission of the State of Alabama, City of Birmingham v. Southern Bell Telephone Co., 84 Commission Leaflet No. 1 (1918):

"The development of the general staff of the American Telephone and Telegraph Company has so grown, and its functions so broadened, that at the present time it renders available to the respondent company"—(the respondent company was in the position of the Pacific and Home Companies here)—"the entire telephone experience of the world, with everything that is of general value in the telephone art and sciences, whether covered by patents or not. It is plain to the Commission that it is absolutely necessary for the respondent company to keep in touch at all times with all improvements in the telephone arts and sciences, and whether it does this through contract with the American Telephone and Telegraph Company, or through its own efforts, the Commission is not concerned.
[fol. 141] "The Commission is naturally interested as to whether the respondent company could get this service cheaper in some other way, either by furnishing it itself, or by some other source. It is obvious that much of this service could not be obtained any other way except in a central organization. It would be impossible to render to every one all of the patent inventions which so largely make up the improvements in the arts of telephony. If each telephone company attempted to organize a general staff, it appears to the Commission that each company would absolutely retain its own inventions, and no company could acquire the right to use everything that will aid in the most efficient and economical service. Moreover, the expense of such organization, it occurs to the Commission, would be prohibitive, unless it were distributed over a large system.

"The fact, if it be a fact, that this arrangement or contract is also a desirable contract from the standpoint of the American Telephone and Telegraph Company does not, to the mind of this Commission, affect the situation whatsoever. This is ordinarily true, of course, of all such contracts. If, for instance, the respondent company rented its instruments from some one else, the person who rented them to the company would expect a profit, and would certainly be entitled to one. Sound business transactions benefit all parties to them."

7. Total Deductions from Revenue.—This is the total of items 2, 3, 4, 5 and 6 and comprises all expenditures reasonably deductible [fol. 142] from revenue in computing a rate of return.

8. Operating Income.—This is the residue of operating revenue remaining after paying all expenses of operation except interest and dividends. It is obtained by subtracting item 7, from item 1.

9. Interest During Construction.—This item comprises the accruals of interest on moneys expended on construction work in progress and is computed on the monthly balances in that account. It is added to item 8 as an offsetting factor for the inclusion of Construction Work in Progress in the rate base.

10. Adjusted Operating Income.—This item is merely the sum of items 8 and 9.

11. Rate Base.—This item is the amount in dollars upon which the utility is entitled to earn a reasonable return. It is derived from the rate base figure in Finding I. The amounts stated herein are average figures for the period and do not represent the rate base as of any specific date.

12. Rate of Return.—This item is the percentage obtained by dividing the Adjusted Operating income by the Rate Base. It is analogous to an interest rate and represents the percentage earning or interest on the rate base.

[fol. 143]

III

Hotel Rates

Finding

The rates proposed by the respondent applicable to hotels are in our opinion unjust, unfair and unreasonable for the service rendered, and the same will be disallowed. Just, fair, reasonable and sufficient rates for this service are included in the rate schedule herein set forth.

IV

Toll Message Rates

Finding

The charges for toll messages now made by the respondent are unjust, unfair, unreasonable, and less than sufficient. The respondent Pacific Company should therefore file a revised toll rate schedule in accordance with the following specifications.

1. The classes of service at present being given to be continued.

2. The distance or base rates on each intrastate route to remain unchanged.

3. In all other respects the revised toll rate schedule, rules and [fol. 144] regulations, shall be similar to the present tariff now in effect with the following exceptions:

a. The initial period for all station-to-station intrastate messages shall be three minutes, and the charge for each additional minute or fraction thereof shall be one-third of the initial rate.

b. The initial period for all person-to-person, messenger and appointment intrastate messages shall be two minutes and the charge for each additional minute or fraction thereof shall be one-half of the initial rate.

c. If the initial rate for station-to-station messages is not evenly divisible by three, the charge for each additional minute or fraction thereof for this classification shall be calculated to the next lower multiple of five cents.

d. If the initial rate for person-to-person, messenger or appointment calls is not evenly divisible by two, the charge for each additional minute or fraction thereof for these classifications shall be calculated to the next lower multiple of five cents.

Discussion

As stated in our order suspending the company's proposed rates [fol. 145] we have reached certain conclusions which we consider more or less fundamental in connection with the rate structure of telephone utilities.

a. From facts thus far developed the Department is inclined to the view that property used and useful devoted to the service of the public should be considered as a whole and the rate schedule so designed as to produce a reasonable return on a reasonable value of the property as a whole, provided that no form of tariff or system of grouping, or segregation, should be adopted that will unduly favor any community or class of communities, to the disadvantage of others.

b. That the toll or long distance rate schedules should be in keeping with the competitive conditions to be met and with due regard to the value of the service rendered, to the end that the local exchange rate schedules, which intimately touch the lives of all of the people of this state and which are a domestic necessity, should be as low as possible.

The changes above directed in the toll rate schedule will accomplish the result contemplated by the Department in its suspension order.

[fol. 146]

V

Exchange Rates

Finding

The existing exchange rates and charges of the respondents are unjust, unfair, unreasonable and less than sufficient. The exchange rates proposed by the respondents in their respective tariffs W. D. P. W. No. 3, are unjust, unfair, unreasonable and more than sufficient. The exchange rates as set out on succeeding pages herein are just, fair, reasonable and sufficient.

That the respondents should file with this Department tariffs containing the schedule of rates herein found to be just, fair, reasonable and sufficient, but containing in all other respects the same rates, rules and regulations as are contained in their respective exchange

rate schedules, W. D. P. W. No. 3, now on file with the Department and under suspension.

That had said rates been in effect during the entire calendar year of 1923, the Pacific system in the State of Washington would have realized a rate of return of 7.34 per cent, as computed on the estimated rate base for that year of $34,789,635.00, which rate of return is just, fair, reasonable and not more than sufficient.

[fol. 147] Rates, Seattle Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.50	$10.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$.05
Extension (with or without bell)	.75	1.00	..	...

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05

*25c. per month additional.

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.25	$4.50
Two-party Line	3.50	3.75
Four-party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

[fol. 148] Rates, Tacoma Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.00	$8.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	..	...

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05

*25c. per month additional.

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Two-party Line	2.75	3.00
Four-party Line	2.25	2.50
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

[fol. 149] Rates, Spokane Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	..	...

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05

*25c. per month additional.

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.75	$4.00
Two-party Line	3.00	3.25
Four-party Line	2.50	2.75
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Line	3.00	3.25

[fol. 150] Hotel Private Branch Exchange Service Rates, Seattle, Tacoma, and Spokane Exchanges, Unlimited Service

Switchboard or Order Board with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3.00
Non-Multiple Cord Type:	
10 lines or less in use	5.00
11- 30 lines in use	6.00
31- 60 lines in use	7.00
61-100 lines in use	8.00
101-150 lines in use	9.00
151-200 lines in use	10.00
201-260 lines in use	11.00
261-320 lines in use	13.00
Multiple Cord Type:	
Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jacks or portion thereof	.30

Stations on Premises in Which Switchboard or Order Board is Located and Connected with That Board

	Seattle	Tacoma	Spokane
Each station not in guest room—			
Without dial—Wall Set.....	$1.25	$0.95	$1.00
Desk Set.....	1.50	1.20	1.25
Each station not in guest room—			
With dial—Wall Set.....	1.50	1.15	1.20
Desk Set.....	1.75	1.40	1.45
Each station in guest room—			
Without dial—Wall Set.....	.75	.55	.60
Desk Set.....	1.00	.80	.85
Each station in guest room—			
With dial—Wall Set.....	1.00	.75	.80
Desk Set.....	1.25	1.00	1.05

Stations outside premises in which switchboard or order board is located—See Mileage Rates, Section 3.

Trunk Lines to central office from switchboards or order boards.
Each bothway trunk line—Individual Line business rate plus $3.00
Each incoming trunk line—Individual Line business rate.

Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[fol. 151] Statement of Operating Income and Rate of Return Estimate for the Year 1923

	Present rates	Company rates	Department allowed rates
1. Operating Revenues	$9,300,441.00	$11,474,615.00	$10,751,350.00
Deductions from Revenues:			
2. Operating Expenses (excl. Depreciation)	5,603,889.00	5,603,889.00	5,603,889.00
3. Taxes Assignable to Operations	581,000.00	658,057.00	637,413.00
4. Uncollectible Revenues	35,618.00	48,367.00	44,445.00
5. Depreciation (on Depreciable Property)	1,674,024.00	1,674,024.00	1,674,024.00
6. Licensee Revenue—Dr.	386,170.00	386,170.00	386,170.00
7. Total Deductions from Revenues	$8,280,701.00	$8,370,507.00	$8,345,941.00
8. Operating Income	$1,019,740.00	$3,104,108.00	$2,405,409.00
9. Interest during Construction	148,122.00	148,122.00	148,122.00
10. Adjusted Operating Income	$1,167,862.00	$3,252,230.00	$2,553,531.00
11. Rate Base (incl. Const. Work in Progress)	$34,789,635.00	$34,789,635.00	$34,789,635.00
12. Rate of Return	3.36%	9.35%	7.34%

[fol. 152] Farmer Line Rates

Finding No. VI

We find that irregularities and discrimination exist in the rates now being charged by respondent for farmer line service. In order to equalize and standarize these rates the respondent should file a supplement to its tariff effective on and after April 1, 1923, carrying the following schedule of charges:

Where the number of exchange stations is	The annual farmer line rate shall be
Over 20,000	$15.00
10,000 to 20,000	11.00
5,000 to 10,000	8.00
3,000 to 5,000	6.00
2,000 to 3,000	5.00
1,000 to 2,000	4.00
500 to 1,000	3.50
Under 500	3.00

Reparation

Finding No. VII

The contention made by the City of Seattle relative to the validity of the present rates of the company and their prayer for a general [fol. 153] reparation order is not supported by the facts or the law, and that portion of the complaint should therefore be dismissed.

Discussion

The existing rates of the Pacific Telephone and Telegraph Company were first established during the period of Federal control, and inasmuch as there existed a doubt as to the validity and legality of rates established during that period being legally continued without some affirmative action on the part of the Commission, the Pacific Telephone and Telegraph Company at the conclusion of Federal control refiled with the Commission the same schedule of rates and the Public Service Commission entered an affirmative order permitting the same to become effective on less than statutory notice.

We find nothing in the record which would lead us to any conclusion except that the rates now in effect are and have been since the conclusion of Federal control the only legal and valid rates applicable during that period.

Petitions to Reopen Case

Some two weeks subsequent to the conclusion of all of the hearings [fol. 154] in this case, the Seattle Chamber of Commerce, the Port

of Seattle and the County Commissioners of King County, Washington, filed with the Department petitions requesting the reopening of this case. The time for the suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the foregoing statements relative to procedure notice, etc., the wide newspaper publicity given the matter periodically since the latter part of the year 1921, and in the absence of a showing warranting the same (the matters in the petition pertinent to the issues having been fully covered by the investigation and reports) petitions for the reopening of this case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue the same is hereby dismissed.

[fol. 155] Order

It is hereby ordered

1. That the respondents, Pacific Telephone and Telegraph Company and Home Telephone and Telegraph Company of Spokane, file with this Department within fifteen (15) days from the date of service of this order, tariffs or supplements to their respective tariffs in conformity with the findings of fact and directions herein contained; and that all rates, rules and regulations as amended or supplemented as herein found and ordered be, and they are hereby made effective as of April 1st, 1923.

2. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be, and the same is hereby dismissed.

Witness The Department of Public Works of Washington this 31st day of March, 1923.

Department of Public Works of Washington, By —— ——, Director. Hance H. Cleland, Supervisor of Public Utilities. By —— ——, Supervisor of Transportation. Attest —— ——, Secretary.

[fol. 156] EXHIBIT "F" TO BILL OF COMPLAINT

The Pacific Telephone and Telegraph Company

Exchange Rates, Seattle-Tacoma, Washington; Farmer Line Rates, Exchanges, State of Washington; Toll Rates, State of Washington, Set Out in Dissenting Opinion of Hance H. Cleland, Supervisor of Public Utilities, State of Washington, in Case Numbers 4902 and 5344

Seattle Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.50	$10.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$.05
Extension (with or without bell)	.75	1.00	...	....

[fol. 157] Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*.	$.05

*25c. per month additional.

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.25	$4.50
Two-party Line	3.50	3.75
Four-party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

Tacoma Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.00	$8.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	....

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*.	$.05

*25c. per month additional.

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Two-party Line	2.75	3.00
Four-party Line	2.25	2.50
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

[fol. 158] Hotel Private Branch Exchange Service Rates, Seattle and Tacoma Exchanges, Unlimited Service

Switchboard or Order Board with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3.00

Non-Multiple Cord Type:

10 lines or less in use	5.00
11- 30 lines in use	6.00
31- 60 lines in use	7.00
61-100 lines in use	8.00
101-150 lines in use	9.00
151-200 lines in use	10.00
201-260 lines in use	11.00
261-320 lines in use	13.00

Multiple Cord Type:

Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jacks or portion thereof	.30

Stations on Premises in Which Switchboard or Order Board is Located and connected with That Board

	Seattle	Tacoma
Each station not in guest room, without dial:		
Wall Set	$1.25	$0.95
Desk Set	1.50	1.20
Each station not in guest room, with dial:		
Wall Set	1.50	1.15
Desk Set	1.75	1.40
Each station in guest room, without dial:		
Wall Set	.75	.55
Desk Set	1.00	.80
Each station in guest room, with dial:		
Wall Set	1.00	.75
Desk Set	1.25	1.00

Stations outside premises in which switchboard or order board is located—See Mileage Rates—Section 3.

Trunk lines to central office from switchboard or order boards.

Each bothway trunk line—Individual Line business rate plus $3.00.

Each incoming trunk line—Individual Line business rate.

Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[fol. 159] Farmer Line Rates

Where the number of exchange stations is	The annual farmer line rate shall be
Over 20,000	$15.00
10,000 to 20,000	11.00
5,000 to 10,000	8.00
3,000 to 5,000	6.00
2,000 to 3,000	5.00
1,000 to 2,000	4.00
500 to 1,000	3.50
Under 500	3.00

The Pacific Telephone and Telegraph Company, State of Washington Inter-Exchange Rates for Intrastate Telephone Toll Messages

I. Classification of Intrastate Toll Telephone Service

The following classes of telephone toll message service shall be furnished effective 12:01 A. M., —— 21, 1922.

1. Station-to-station Messages.—This service shall be defined by the following conditions:

(a) Orders for station-to-station service shall specify the telephone station called, either by telephone number, or by the name of the [fol. 160] subscriber of the called station.

(b) Under this classification, orders will not be accepted to establish communication between particular persons.

(c) The measurement of the duration of a station-to-station message for purposes of the application of rates shall begin at the moment when telephonic communication is established between the called and the calling stations. The term "station" for the purpose of this clause is defined to include a private branch exchange switchboard operator, in those cases where private branch exchange systems are involved in station-to-station service.

(d) Station-to-Station service may be operated as a Number Service, in which case the called station may be designated only by number, through A and B switchboards, or through tandem operators, etc.; or it may be operated through toll switchboards, and technically known as an "AY" service, depending on the local circumstances as to operating conditions, plant conditions, and the circumstances as to directory distribution and areas; and the more economical method will be employed in each case. The choice of [fol. 161] method of operating station-to-station service will be determined solely as an operating arrangement, not in any way affecting rates or service; except that where the number method is employed orders will be accepted stating only the telephone number of the called station.

(e) The charges for station-to-station messages shall not be "reversed," i. e., collected at the called station.

2. Person-to-person Calls.—This service shall be defined by the following conditions:

(a) Orders will be accepted to establish communication between specified persons.

(b) The measurement of the duration of a person-to-person message for the purpose of the application of rates shall begin at the moment when communication begins with or between the particular person or persons specified in the order; provided that certain report charges will be made under the conditions specified in the clause next below, where communication may not be established.

(c) Orders for person-to-person service shall be accepted only under the condition that a limited charge (to be known as "Report Charge") will be made in the following cases where it is impossible [fol. 162] to establish communication between particular persons:

(1) When the order is to establish communication with a particular person in a given city, telephone address unknown, and the particular person can not be secured within one hour (exclusive of any time during which "no circuits" or other cause prevent communication of the order to the distant city or exchange, or its completion).

(2) When the designated person called refuses to talk.

(3) When the report is returned that the designated person called is "out" or "out and will return at (specified time)," or "out and time of return unknown," "is absent from the city," and similar reports advising the calling subscriber of the facts ascertained when failure to complete the order is due solely to the circumstances of the called person or to fault in describing the location of the called person, and when all of the work preliminary to establishing communication with the called person is done.

(4) When communication between the designated persons can not be established because the designated person at the calling station [fol. 163] is absent at the calling station; provided that no charge shall be made in such cases where the delay, if any, in establishing connection is greater than one hour.

(5) When the designated person at the calling station refuses to talk when the facilities for communication have been established.

3. Appointment Calls.—Appointment calls are person-to-person calls, the order for which provides that communication is to be arranged for to take place at a specified time.

4. Messenger Calls.—Messenger calls are person-to-person calls requiring the use of a messenger to secure attendance of a designated person at one of the public pay stations at the distant point.

5. Collect Calls.—Collect calls are person-to-person calls, the charges for which are "reversed," i. e., to be collected from the subscriber of the distant station at which the call is to be completed.

II. Toll Rates for Intrastate Station-to-station Messages

Effective 12:01 A. M., —— 21, 1922, the following initial period rates are established for toll messages where the distance between [fol. 164] exchanges, or toll points, does not exceed 40 miles by direct measurement on a U. S. Government Post Route Map.

For distance more than	But not more than	Initial rate
0 Miles	12 Miles	$0.10
12 "	18 "	.15
18 "	24 "	.20
24 "	32 "	.25
32 "	40 "	.30

The following initial period rates are established for station-to-station toll messages for all distances in excess of 40 miles by direct air line measurement:

For distance more than	But not more than	Initial rate
40 Miles	48 Miles	$0.35
48 "	56 "	.40

For each additional 8 miles or fraction thereof, 5 cents additional.

For the purpose of applying standard rates where the direct air line distance between points is in excess of 40 miles, distance shall be determined as the air line distance between the centers of blocks 7 miles square, within which the points of communication are located, and where the distance is in excess of 350 miles by the air line distance between the centers of sections 35 miles square.

[fol. 165] The block and section scaling system for purposes of measuring toll rate distance between points more than 40 miles distant by direct measurement, shall consist of a grid containing sections 35 miles square, each section subdivided into 25 blocks seven miles square, so placed on a polyconic projection of a Government survey map of the United States that section lines coincide with a line drawn approximately north and south through the center of the United States and with a line at right angles thereto passing through the northwestern point of the International boundary line in the Strait of Georgia.

III. Toll Rates for Other Classes of Toll Calls

Effective 12:01 A. M., —— 21, 1922, the following toll message rates are established for person-to-person calls, appointment calls, and messenger calls:

1. The initial period rates for person-to-person calls shall be approximately 25 per cent in addition to the station-to-station rates between the same points, in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls, attached hereto, but no person-to-person rate shall be less than 15 cents.

[fol. 166] 2. In those cases where person-to-person calls are not completed and a report is made or the conditions are such as described in paragraph I, 2 (c) of this schedule a report charge shall be made of approximately one-fourth the initial rate for station-to-station messages between the same points, in accordance with the schedule of Computed Rates for Person-to-Person, Appointments and Messenger Toll Calls, attached hereto and hereby made a part of this schedule; but no report charge shall be less than 5 cents for any one call, nor more than $2.00.

3. The rates for appointment calls shall be approximately 50 per cent in addition to the rates for station-to-station messages between the same points in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Call, hereto attached and hereby made a part of this schedule; but in the case of an appointment call order, where the distant station is reached, whether the appointment be made or not, the Report Charge applicable in case of person-to-person calls between the same points shall be made.

4. The rates for messenger calls shall be the same as applied to appointment calls, between the same points, plus any charges that may be required for the service of messengers.

[fol. 167] IV. Standard Toll Night Rates

Effective 12:01 A. M., —— 21, 1922, the following reductions shall be effective in the rates and charges for station-to-station messages only, between the hours of 8:30 P. M. and 4:30 A. M.

1. Between the hours of 8:30 P. M. and 12 midnight, the night rates for station-to-station messages shall be approximately 50 per cent less than the regular day rates, in accordance with the Schedule of Computed Night Rates attached hereto and hereby made a part of this schedule, but no night rate shall be less than 25 cents.

2. Between the hours of 12 midnight and 4:30 A. M., the night rates shall be approximately 75 per cent less than the established day rates, in accordance with the Schedule of Computed Night Rates attached hereto, and hereby made a part of this schedule; but no night rate shall be less than 25 cents.

3. For the purpose of applying night rates, the time of day at the point at which a station-to-station message originates shall be used.

4. Day rates only shall be employed between the hours of 4:30 A. M. and 8:30 P. M.

[fol. 168] V. Initial Period, Overtime Periods, and Overtime Rates

Effective 12:01 A. M., —— 21, 1922, the following initial periods, overtime periods and overtime rates are established:

Classification	Initial period	Overtime period
Station-Station	3 minutes	1 minute
Person-Person	2 minutes	1 minute
Messenger and appointment	2 minutes	1 minute

The overtime rates shall be—

Station-to-station:

Where the initial rate is	Overtime rate per period
*$0.15	$0.05
.15	.05
.20	.05
.25	.05
.30	.10
.35	.10
.40	.10
.45	.15

and thereafter approximately one-third of initial rate and in no case more than one-third of the initial rate.

[fol. 169] Person-to-person and Messenger and Appointment.

Where the initial rate is	Overtime rate per period
$0.15	$0.05
.20	.10
.25	.10
.30	.15
.35	.15
.40	.20
.45	.20

and thereafter approximately one-half of the initial rate and in no case more than one-half of the initial rate.

*Minimum Messenger and Appointment Rate $0.20.

Schedule of Computed Rates for Person-to-Person Appointment and Messenger Toll Calls

When the station-to-station day rate is	The completed person-to-person rate is	The completed appointment and messenger rate is	The report charge is
$0.10	$0.15	$0.20	$0.05
.15	.20	.25	.10
.20	.25	.30	.10
.25	.30	.35	.10
.30	.40	.45	.10
.35	.45	.50	.10
.40	.50	.60	.10
.45	.55	.65	.15
.50	.60	.75	.15
.55	.65	.80	.15
.60	.75	.90	.15
.65	.80	.95	.20
.70	.85	1.05	.20
.75	.90	1.10	.20
[fol. 170]			
.80	1.00	1.20	.20
.85	1.05	1.25	.25
.90	1.10	1.35	.25
.95	1.15	1.40	.25
1.00	1.25	1.50	.25
1.05	1.30	1.55	.30
1.10	1.35	1.65	.30
1.15	1.40	1.70	.30
1.20	1.50	1.80	.30
1.25	1.55	1.85	.35
1.30	1.60	1.95	.35
1.35	1.65	2.00	.35
1.40	1.75	2.10	.35
1.45	1.80	2.15	.40
1.50	1.85	2.25	.40
1.55	1.90	2.30	.40
1.60	2.00	2.40	.40
1.65	2.05	2.45	.45
1.70	2.10	2.55	.45
1.75	2.15	2.60	.45
1.80	2.25	2.70	.45
1.85	2.30	2.75	.50
1.90	2.35	2.85	.50
1.95	2.40	2.90	.50
2.00	2.50	3.00	.50
And thereafter increasing in 5 cent steps.	And thereafter 25% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, 25% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter 50% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 2, 50% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter one-fourth the Station - to - Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, one-fourth the Station - to - Station day rate computed to the next higher multiple of 5 cents; but no Report Charge will exceed $2.00.

Schedule of Computed Night Rates for Station-to-Station Toll Messages

When the day rate is	The rate between 8:30 p. m. and 12:00 midnight is	The rate between 12 midnight and 4:30 a. m. is
$.10	Day Rate	Day Rate
.15	" "	" "
.20	" "	" "
.25	" "	" "
.30	$.25	$.25
.35	.25	.25
[fol. 171]		
.40	.25	.25
.45	.25	.25
.50	.25	.25
.55	.30	.25
.60	.30	.25
.65	.35	.25
.70	.35	.25
.75	.40	.25
.80	.40	.25
.85	.45	.25
.90	.45	.25
.95	.50	.25
1.00	.50	.25
1.05	.55	.30
1.10	.55	.30
1.15	.60	.30
1.20	.60	.30
1.25	.65	.35
1.30	.65	.35
1.35	.70	.35
1.40	.70	.35
1.45	.75	.40
1.50	.75	.40
1.55	.80	.40
1.60	.80	.40
1.65	.85	.45
1.70	.85	.45
1.75	.90	.45
1.80	.90	.45
1.85	.95	.50
1.90	.95	.50
1.95	1.00	.50
2.00	1.00	.50
And thereafter increasing in 5 cent steps.	And thereafter one-half the day rate. When the day rate is not evenly divisible by 2, one-half the day rate computed to the next higher multiple of 5 cents.	And thereafter one-fourth the day rate. When the day rate is not evenly divisible by 4, one-fourth the day rate, computed to the next higher multiple of 5 cents.

[File endorsement omitted.]

[fol. 172] UNITED STATES OF AMERICA:

In the United States District Court for the Western District of Washington. In Equity

No. 166-E

SUBPŒNA AND RETURN—Filed Apr. 26, 1923

The President of the United States of America to E. V. Kuykendall, as Director of Public Works of Washington; Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the person constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, Defendants, Greeting:

You are hereby commanded, That you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of — on the 14th day of May, 1923 to answer a Bill of Complaint filed against you in said Court by The Pacific Telephone and Telegraph Company, a Corporation and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of the law.

Witness the Honorable Edward E. Cushman, Judge of said Court, and the seal thereof, at Tacoma, Washington, this 24th day of April, 1923.

——— ———, Clerk, By Alice Huggins, Deputy Clerk. (Seal U. S. Court.)

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

——— ———, Clerk, By Alice Huggins, Deputy Clerk. (Seal U. S. Court.)

Return on Service of Writ

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Subpœna in Equity on the therein-named E. V. Kuyendall, as Director of Public Works of Washington, by handing to and leaving a true and correct copy thereof with Frank R. Spinning, Supervisor of Transportation of Washington, at his usual place of business personally at Olympia, Washington in said District on the 25th day of April, A. D. 1923.

E. B. Benn, U. S. Marshal, By John T. Secrist, Deputy.

Marshal's Return

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify, That I have served the within writ by delivering to and leaving a true copy thereof with Hance H. Cleland, as Supervisor of Public Utilities of Washington, Frank R. Spinning as Supervisor of Transportation of Washington, and John H. Dunbarr, as Attorney General of Washington, at Olympia, Washington.

E. B. Benn, United States Marshal, By John T. Secrist, Deputy. April 25, 1923. Fees: 10.68.

[File endorsement omitted.]

[fol. 173] IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER—Filed Apr. 28, 1923

This matter coming on for hearing before the Honorable Edward E. Cushman, Judge of the above named court on the motion of the above named plaintiff for a temporary restraining order, restraining the defendants, and each of them, and all other persons from attempting to compel the plaintiff, its officers, agents and employees, to observe, maintain or keep in force the rates and charges now prescribed by the Department of Public Works of Washington, as set forth in Schedule "Exhibit A" referred to in the bill of complaint and filed therewith, and from attempting to interfere with or prevent the plaintiff, its directors, officers, agents and employees, from immediately putting into effect the rates and charges set forth in schedule "Exhibit F" referred to in the bill of complaint and filed therewith, and from taking any steps or proceedings against the plaintiff, its directors, officers, agents, or employees, to enforce any penalty or remedy against the plaintiff, its directors, officers, agents or employees, for disregarding the rates and charges set forth in said schedule "Exhibit A," or from putting into effect any rates or charges not in excess of those set forth in said schedule "Exhibit F," and that an order to show cause herein, upon the application of the plaintiff herein, directed to the above named defendants, and each of them, requiring them, and each of them, to show cause why a temporary injunction should not issue as prayed for in the bill of complaint heretofore filed herein, and it being necessary that notice of said application for said temporary injunction be given before said application shall be heard and determined to not only all of the defendants named herein, but to the Governor of the State of Washington [fol. 174] as well; It is therefore, ordered that the defendants, and each of them, be and appear before the above named court in the District Court of the United States in and for the Western District of Washington, Southern Division, sitting at Tacoma, in said Dis-

trict on the 30th day of April, 1923, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as a court constituted as provided by Section 266 of the Judicial Code of the United States can be convened, then and there to show cause, if any they have, why they, and each of them, should not be enjoined and restrained in the manner hereinbefore stated.

It further appearing to the court that immediate and irreparable loss and damage will result to the plaintiff unless a temporary restraining order is granted, it is ordered that until a hearing of this show cause order and determination thereof, the defendants, and each of them, and all other persons, are restrained from attempting to compel the plaintiffs, its officers, agents and employees, to observe maintain and keep in force the rates and charges now prescribed by the Department of Public Works of Washington, as set forth in schedule "Exhibit A" referred to in the bill of complaint and filed therewith, and from attempting to interfere with or prevent the plaintiff, its directors, officers, agents, or employees from immediately putting into effect the rates and charges set forth in schedule "Exhibit F" referred to in the bill of complaint and filed therewith, and from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees to enforce any penalty or remedy against the plaintiff, its directors, officers, agents, or employees for disregarding the rates and charges set forth in said schedule "Exhibit A" and from putting into effect any rates or [fol. 175] charges not in excess of those set forth in said schedule "Exhibit F."

And it is further ordered by the court that a copy of this order be served at least five (5) days before said 30 day of April, 1923, upon each and every of the defendants above named, including the Attorney General, and also upon the Governor of the State of Washington.

And it is further ordered that this order shall become effective upon the plaintiff company giving a bond in the sum of $175,000.00 to be approved by the court, conditioned to reimburse subscribers the excess over the rates set forth in "Exhibit A" in case it is finally determined that the increase in rates hereby authorized ought not to have been authorized; and it is further ordered that until the further order of this court, the plaintiff company shall keep its accounts in such a way that said excess due to the rates made effective by this order and paid by each subscriber, can be readily and accurately ascertained.

And it is further ordered that the plaintiff shall file with the Clerk of the above named court, conveniently after the first day of each month, a statement of the amount collected from each of its subscribers, together with a statement of the amount that would have been collected had the rates set forth in "Exhibit A" been in force, and that when a final decree is entered, if it shall be determined that the rates set forth in "Exhibit A" should have been continued in effect by the plaintiff, then and in that event the difference between the rates set forth in "Exhibit A" and the rates collected, shall be paid to a special master, to be appointed by this court, and by the special master distributed to the various persons entitled to receive

[fol. 176] the same; and that in the event that a final decree is entered, adjudicating that the rates set forth in "Exhibit A" should have been continued in effect by the plaintiff, and the plaintiff should fail to pay to the special master the difference between the rates set forth in "Exhibit A" and the rates collected, then the special master, appointed by this court, may institute suit on the bond in behalf of all the subscribers, to recover the amounts to which they, respectively, may be entitled.

Done in open court this 24th day of April, 1923.

Edward E. Cushman, Judge.

I hereby certify that I received the annexed Restraining Order and Order to Show Cause on the 25th day of April, 1923, and thereafter on the same date, I served E. V. Kuykendall as Director of Public Utilities of the State of Washington and Hance H. Cleland as Supervisor of Public Utilities, by delivering to and leaving with J. H. Brown, Secretary of the Department of Public Works at Olympia, two certified copies of this Order. Thereafter on the same date, I served Frank R. S. Spinning, Supervisor of Transportation of the State of Washington, John H. Dunbar Attorney General of the State of Washington, John H. Dunbar, Attorney General of the Washington, by delivering to and leaving with them a certified copy of this Order.

E. B. Benn, U. S. Marshal, By E. E. Gaskill, Deputy.

[File endorsement omitted.]

[fol. 177] In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Affidavit of C. E. Fleager—Filed Apr. 24, 1923

State of California,
City and County of San Francisco, ss:

I, C. E. Fleager, being first duly sworn, depose and say: That I reside in Berkeley, California, and am forty-three years of age; I have been employed in the telephone business for twenty-three years and by The Pacific Telephone and Telegraph Company and its predecessors for twenty-one years; I am Assistant Vice-President of plaintiff company and during my experience with said company [fol. 178] have had responsible charge of general engineering matters running to the design and construction of toll and exchange lines, fundamental engineering plans, inventory and appraisal work and similar general engineering matters; I am familiar with telephone properties and with the work, labor and material entering into the construction of the same and with the units of cost thereof and in the regular course of my employment I have engaged at dif-

ferent times in making appraisals of telephone property situated in the States of Idaho, Washington, Oregon, California and Nevada, the aggregate values of such run over one hundred millions of dollars, and during the last nine years I have been giving particular attention to the analysis of all costs incurred by telephone companies in all work of construction performed by them.

I am thoroughly familiar with the entire property belonging to the plaintiff company in the State of Washington and devoted by it to the furnishing of intrastate telephone service in said state and for some years past have had responsible charge of inventory and appraisal work in connection with that property; that for several months I have been employed with a force under my direction in making an appraisal of said property and in the course of such em- [fol. 179] ployment I have made a valuation as of the present time, of all of the property used or useful by the plaintiff company in the rendition of its telephone service in the State of Washingotn.

In arriving at the present fair value of the property of plaintiff hereinafter stated I have taken into consideration among other things, the following facts and matters:

(a) The cost of said property as evidenced by the affidavit of C. T. Blanck, filed herein, is the sum of $29,347,254 as of December 31, 1922, for the entire property in the state; (excluding Spokane); for the property in the Seattle Exchange the sum of $17,023,372 and the property in the Tacoma Exchange the sum of $2,888,021, and the fact that said cost includes the cost of a large amount of property, approximately fifty per cent of the total, which was constructed prior to the year 1915 before the increases in labor and material costs due to conditions prevailing during and since the World War became operative.

(b) The amount on the books for said property being the sum of $30,009,059 for the property in the State of Washington (excluding Spokane); the sum of $17,344,047 for the property in the Seattle [fol. 180] Exchange and the sum of $3,009,769 for the property in the Tacoma Exchange, all as of December 31, 1922.

(c) The cost of reproduction new of said property. By using the actual units of property making up the said plant used or useful and devoted exclusively to the rendition of telephone service by the plaintiff in the State of Washington and applying thereto prices of labor and material proper as of this time, I have determined the cost of reproduction of said property to be, as of December 31, 1922, the sum of $48,087,785 for the State of Washington (excluding Spokane); the sum of $27,149,130 for the Exchange of Seattle and the sum of $4,998,964 for the Exchange of Tacoma. This value includes a reasonable allowance for working capital, materials and supplies and for the item usually called going concern value. In ascertaining the cost of reproduction new, above stated, I have used prices which I regard as applicable and which are considerably lower than the prices prevailing during and since the World War. Had I used the peak prices prevailing during and since the World War the cost of reproduction new of said property would have been

a sum in excess of $55,000,000 for the State of Washington (exclud-
[fol. 181] ing Spokane); $31,000,000 for the Seattle Exchange and $5,700,000 for the Tacoma Exchange.

(d) Said telephone property of the plaintiff is and has been, at all times of my employment with the plaintiff company, in a 100 per cent service condition and I have, from time to time, observed and caused to be observed, inspected and examined said property and parts thereof and, in a general way, am familiar personally with the present condition of said property. I have taken into consideration, in arriving at the present fair value of said property, such depreciation in the property as actually exists and have determined that the cost of reproduction of said property less depreciation as of the thirty-first day of December, 1922, for the State of Washington (excluding Spokane); is the sum of $43,962,085; for the Exchange of Seattle the sum of $24,919,930 and for the Exchange of Tacoma the sum of $4,534,264.

(e) Appraisals made of the land owned by the plaintiff throughout the State of Washington, as determined from time to time by disinterested appraisers familiar with real estate values in the various localities in which said parcels of land are located.

[fol. 182] (f) Based upon my experience in examining and appraising the properties and operations of the plaintiff company and my knowledge of plaintiff's actual requirements over several years for working capital and material and supplies necessary in the rendition of telephone service in the State of Washington, I have estimated the amount reasonably required by plaintiff (excluding Spokane) for such purposes at not less than $1,013,100.

After giving careful consideration to all of plaintiff's property, its history, location and character, and to the factor usually called going concern value, and all facts and matters above enumerated and all other factors within my knowledge affecting its value, it is my opinion that the present fair value of the entire property of the plaintiff used or useful and devoted by it to furnishing telephone service in the State of Washington (excluding Spokane) as of December 31, 1922, is in excess of the sum of $35,616,896; for the Exchange of Seattle in excess of the sum of $20,852,067 and for the Exchange of Tacoma in excess of the sum of $3,457,290.

I further say that in arriving at such present fair value I have made no allowance for the value of any of plaintiff's franchises or
[fol. 183] rights to own or operate a telephone system in the State of Washington or any of its municipalities.

C. E. Fleager.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 184] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. T. BLANCK AS TO COST OF CONSTRUCTION OF PROPERTY—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. T. Blanck, being first duly sworn, deposes and says: That he resides in the City of Berkeley, State of California; that he is thirty-six (36) years of age, and, in the year 1902 was first employed in telephone engineering, construction and maintenance work by The Pacific Telephone and Telegraph Company, and its predecessors, and [fol. 185] was continuously employed by the Company until the end of the year 1917 when he entered the United States Army as a commissioned officer in the Signal Corps and upon his return from France upon completion of his military service, late in the year 1919, re-entered the employ of The Pacific Telephone and Telegraph Company and he has since been employed continuously by the plaintiff company in general engineering and appraisal work.

That he is thoroughly familiar with telephone properties and with the cost of labor and materials entering into the construction of same and with the units of cost thereof, and in the regular course of his employment he has engaged in making appraisals of telephone properties situated in the States of Washington, Idaho, Oregon, California and Nevada, and in France, the aggregate value of which runs into more than one hundred millions of dollars and, during the last sixteen or seventeen years, he has given particular attention to the analysis of all costs incurred by telephone companies in all work of construction performed by them.

That he is thoroughly familiar with the entire property belonging to the plaintiff company in the State of Washington and devoted by it to the furnishing of telephone service in said State.

[fol. 186] That in arriving at the cost to plaintiff of its property in the State of Washington, he has taken into consideration, among other things, the following facts and matters:

(a) The exhaustive inventory and appraisal of said property as of December 31, 1913. This appraisal was made on the basis of actual performance applied to the items of property as inventoried, with the exception of the item "Land," which was included therein at the then market value, determined by disinterested appraisers familiar with real estate valuation in the various localities in which the parcels of such lands and buildings were located. This actual performance basis was determined from the costs as shown by the official records of the Company which were and are kept in accordance with the system of accounting for telephone companies prescribed by the Interstate Commerce Commission in its circular entitled "Uni-

form System of Accounts for Telephone Companies" and which system was adopted by the Public Service Commission, now the Department of Public Works of the State of Washington.

This inventory and appraisal was exhaustively checked by engineers of the Public Service Commission and was found by them to [fol. 187] be substantially correct. This inventory and appraisal was presented in formal hearing before the Public Service Commission of the State of Washington on January 24, 1916, in Case No. 1810, before said Commission, and identified in the records of that case as Company Exhibit No. 1, Vols. 1-24, inclusive, and Exhibit No. 4, Vols. 25-53, respectively.

(b) The additions and betterments to said property during the period December 31, 1913, to December 31, 1922. The additions and betterments, or "Net Additions," are taken from the official records of the Company and represent the literal facts taken from reports of actual daily operations in accordance with the principles established in the accounting methods prescribed by the Interstate Commerce Commission and the Public Service Commission, now the Department of Public Works of the State of Washington.

(c) The amount on the books of plaintiff for Fixed Capital (excluding Intangible Capital) and Working Assets as of December 31, 1922. This is the sum of $30,009,059, for the property in the State of Washington; sum of $17,344,047 for the Seattle Exchange; and, the sum of $3,009,769 for the Tacoma Exchange, all as of December 31, 1922.

[fol. 188] That adding the additions and betterments to the actual performance appraisal as of December 31, 1913, the cost to plaintiff of its property in the State of Washington (not including Spokane, that being the property of The Home Telephone and Telegraph Company of Spokane and Land being included at present value), as of December 31, 1922, was the sum of $29,347,254, including therein the sum of $1,013,122 for Working Capital and Materials and Supplies; that the cost to plaintiff of its property in its Seattle Exchange (Land being included at present value) amounts to the sum of $17,023,372, included therein being the sum of $709,509 for Working Capital and Materials and Supplies; that the cost of its property in its Tacoma Exchange (Land being included at present value) amounts to the sum of $2,888,021, included therein being the sum of $131,646 for Working Capital and Materials and Supplies.

That the cost of the property of plaintiff so found herein is substantially the same as the value for rate making purposes fixed by the Department of Public Works in their Findings of Fact, Order and Opinion in Cause, Case 5344, as of June 30, 1922, plus actual additions and betterments to December 31, 1922.

[fol. 189] That the cost of the property of plaintiff so found herein is less than the amount on the books of plaintiff for said property

C. T. Blanck

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 190] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF J. C. NOWELL—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. C. Nowell, being first duly sworn, deposes and says that he is the Vice-President and General Manager of the plaintiff, The Pacific Telephone and Telegraph Company, and resides at Hillsborough, California. That he was graduated from the Massachusetts Institute of Technology in the year 1894 with the degree of Bachelor of Science. That he has been in the telephone business for twenty-
[fol. 191] nine years continuously; that he was first employed as Inspector by the American Telephone and Telegraph Company; that he was employed in the Plant Department of the Bell Telephone Company of Philadelphia and its successor, the Bell Telephone Company of Pennsylvania, from 1895 to 1913, successively as Supervisor, Superintendent of Maintenance, Engineer and General Superintendent of Plant. That on or about March 14, 1913, he became General Manager of plaintiff, and afterwards and on or about August 6, 1919, he became Vice-President and General Manager thereof, which position he still holds.

That ever since he became General Manager he has had, and still has, general charge of the operating departments of plaintiff; that he is thoroughly familiar with all branches of its business and with its methods of conducting same, and with all of its plant and property. That the plaintiff owns and operates telephone and telegraph lines and exchanges and conducts a public telephone and telegraph business in the States of Washington, Oregon, California, Nevada and Idaho. That the plaintiff furnishes exchange service and also toll service. That it had on December 31, 1922, in its entire system,
[fol. 192] 708 central offices or exchanges; that of said central offices 702 are within the State of Washington outside the Spokane Exchange, and six in the Spokane Exchange, the exchange last mentioned being the property of The Home Telephone and Telegraph Company of Spokane, all of the capital stock of which is owned by plaintiff.

That plaintiff is now operating in its entire system upwards of 377,000 telephones, or as they are commonly referred to in the tele-

phone business, "stations." That of said number of stations upwards of 141,000 are in the State of Washington outside the Spokane Exchange, and upwards of 31,700 in the exchange last named. That the number of stations operated by the plaintiff is growing continually and the estimated growth in the number of stations during the year 1923 in the State of Washington is upwards of 8% of the stations now in service, or in other words, approximately 11,400 stations will be added to the plaintiff's system in that state during the year, not including Spokane, and 2,100 stations in the Spokane Exchange.

That the plaintiff has in the State of Washington more than 116,000 subscribers' accounts, of which more than 56,000 are for Seattle subscribers and more than 16,000 for Tacoma subscribers; [fol. 193] that there are more than 22,000 subscribers' accounts for Spokane. That between December 31, 1912, and December 31, 1922, the number of stations operated by the plaintiff in the State of Washington, outside of Spokane, has increased from 83,300 to upwards of 141,000 and in Spokane from 21,411 to upwards of 31,700.

That of the 12 central offices in Seattle three have machine switching and nine have manual equipment. Of the manual central offices three are to be replaced by machine switching during 1923 or early in 1924.

That the Department of Public Works in its majority opinion of March 31, 1923, has quoted from a paper read before the American Institute of Electrical Engineers in 1919, and draws from this paper the conclusion: "We must therefore conclude that the installation of the machine switching device in Seattle will, on the whole, reduce the Company's expenses and our conclusion and order in this case will be made with that assumption in view." That in the judgment of Affiant the Department of Public Works is no more warranted in applying to Seattle a conclusion drawn by them from said article than they would be warranted in deducing from the fact that because a certain number of bushels of grain per acre might [fol. 194] be grown in the Palouse country, that therefore the same or any fixed number of bushels of grain per acre could be grown in Thurston County, Washington, for the reason that the applicability or otherwise of any results experienced in the exchanges upon which said paper was based, would depend entirely upon whether the factors and conditions existing in those exchanges existed in Seattle. That with reference to the exchanges cited by the Department, it is patent upon the face of the record, i. e., the article relied upon by them, that the data referred to comprises only operating expenses and is cited without reference to total results inclusive of carrying charges upon total investment, which omission makes impossible a conclusion in Seattle based upon the incomplete results recited in the article. On the other hand, the conditions in Seattle are well known and have been completely and thoroughly investigated by the Department's engineering force. Affiant asserts that the machine switching installation at Seattle partially replacing at this time manual equipment, does not effect immediate economies in the total operations involved in giving telephone service to the people

of the City of Seattle now nor will it for the next several years. That in spite of this fact the installation of machine switching equip-
[fol. 195] ment in Seattle was warranted by the following considerations: that experience in general industry shows that whenever machine operation is sufficiently developed to insure satisfactory production at costs that are no higher than for manual operation, the substitution should be made. That this practice has been consistently followed in developing the telephone business and now a large part of the work is done by machinery that was formerly done by hand. That machine methods offer a wide field for additional improvements which will help to cut down the constant increase in operating costs in large cities caused by the growth in stations and calls to be handled requiring the installation of more expensive cable plant and central office equipment, not only for connecting new subscribers to the central offices, but also required to handle the ever increasing calls from subscribers connected with one central office, for subscribers connected with a distant central office; that machine operation also provides means for furnishing more speedy and satisfactory service on such calls than does manual equipment.

That the machine switching equipment installed in Seattle is of a type known to be capable of meeting the traffic and service conditions inhering in the Seattle Exchange at this time, and known to
[fol.196] be capable of satisfactorily and economically caring for the expansion of stations and traffic with the growth of the city. That the equipment has other immediate advantages, several of which were referred to in the majority order, namely:

1. Speed of connection and disconnection.

2. Ease of obtaining connection and disconnection.

3. Accuracy of connection.

4. Voice transmission.

5. Secrecy.

6. The elimination of such faults inherent in manual operation as—

(1) Fluctuation of service.

(2) Impairment of service by epidemics, strikes, etc.

(3) Mistranslation of calling subscribers' desires.

That on the 22nd day of September, 1919, Cause No. 4902 was brought by the Public Service Commission of Washington against plaintiff, alleging inadequacy of facilities and service properly to meet the requirements of the people of Seattle. That at the hearing of said cause the plans of plaintiff for changes in its method of operation and additions to plant requisite to meet the situation, in-
[fol. 197] cluding the installation of machine switching equipment, were developed before the Commission. That the expenditures of plaintiff during 1920, 1921 and 1922 in the City of Seattle were

largely controlled by the plans developed at the hearing in said cause which was not dismissed until in the order of March 31, 1923.

That the plant and property of plaintiff are at all times kept in first class condition by making necessary repairs and renewals so that from an operating and service standpoint all of the plant and property in its entire system are kept in a high state of operating efficiency.

That the business of plaintiff requires large amounts of new capital continually because of the continual growth of the business and because of its character; that as new subscribers or users of the service are added to the system, it is necessary to install new telephones, equipment and wires running from the place where the telephone station is located to the central office from which the telephones are served. That as the capacity of the switchboards of the plaintiff is filled up, the installation of additional switchboards, apparatus and equipment, the rearrangement of central offices, the acquisition of [fol. 198] additional real estate and the construction of new buildings are required, the total cost of which runs into great sums of money. That the actual net expenditures made by plaintiff for additional property and construction during the years 1921 and 1922 in the State of Washington (excluding Spokane) and for Seattle and Tacoma were as follows:

	Year 1921	Year 1922
State of Washington	$4,660,520.00	$4,389,063.00
Seattle	4,027,238.00	3,495,421.00
Tacoma	69,819.00	86,818.00

That the following amounts are planned to be expended by plaintiff for additional property and construction for the State of Washington (excluding Spokane), and for Seattle and Tacoma during the years 1923 and 1924:

	Year 1923	Year 1924
State of Washington	$4,384,000.00	$3,000,000.00
Seattle	2,560,000.00	1,200,000.00
Tacoma	286,000.00	300,000.00

That since becoming General Manager of plaintiff in the year 1913 one of Affiant's chief duties has been to supervise and examine into the operating expenses of the plaintiff and he has made every effort during all of the time since that date to effect as many econo- [fol. 199] mies as possible and to keep the operating expenses at as low a level as is consistent with the maintenance of the plant and the furnishing of good service. That in the opinion of Affiant the operating expenses of plaintiff at the present time are, and during the past have been fair and reasonable.

Affiant asserts that it appears upon the face of the order made by the Department on March 31, 1923, that the return of 6.01% which the Department claims the plaintiff company would realize under the rates approved in said order, must be reduced by the amount of the income tax based upon the results of the rates specified in said

order, payable for the year 1923 by the plaintiff company for the plaintiff system in the State of Washington, for the reason that although the Department stated that said income tax should be included as an expense before reaching a net upon which to figure a per cent return, which income tax in fact to the amount of more than $95,000.00 was included in the computation made in the order, nevertheless said amount was omitted in the calculation used in arriving at the return of 6.01%. In fact the correction of this, without considering other mathematical errors made by the Department [fol. 200] in the majority order which would further reduce the indicated return to plaintiff, would, on the basis used by the Department, develop a return of only 5.74% instead of 6.01%.

That Affiant is familiar with the contract between plaintiff and the American Telephone and Telegraph Company, referred to in the order of the Department of March 31, 1923, as the "4½% of contract," and in particular Affiant is familiar with the services rendered by said American Company to plaintiff under said contract. That the telephone service as rendered by plaintiff at this time could not be rendered without the facilities and services furnished by the American Company under said contract. That such services and equipment are not available to the Pacific Company from any other source. That in consequence, the payment by plaintiff of the sum of $388,365.00 for the year 1922 made in payment of such services, and the corresponding amount due and payable under said contract from the revenues of 1923 were and are inescapable. That said services and the equipment furnished in conjunction therewith are and will be worth to plaintiff in excess of the amount paid and payable to the American Company under said contract. That said services [fol. 201] can not be secured for the payment of $161,653.00, the amount arbitrarily set up by the Department for the year 1923, and that the return of 5.74% disclosed by the above correction of the Department's calculation, would for this reason alone, be reduced by the difference between said amount and the amount payable under the contract, and that this difference for the revenues set out in the majority opinion, for the year 1923 is the sum of $226,347.00.

That in addition to the corrections noted above, the expense for depreciation to be met by plaintiff from its revenues from its system in the State of Washington, as set out in the affidavit of C. E. Fleager, will be upwards of $600,000 in excess of the amount figured by the Department. That with the correction of the errors noted and with the 4½% payment and expense for depreciation herein set forth, the rates fixed in the majority order of the Department will give a rate of return to plaintiff from its operations in the State of Washington of not more than 3.35% on the value for rate making purposes fixed by the Department, and of not more than 2.75% on the fair value of plaintiff's property in the State of Washington.

J. C. Nowell.

[fol. 202] Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 203] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. S. CASASSA—Filed April 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. S. Casassa, being duly sworn, deposes and says: That he resides in San Francisco, California. That he was first employed in the telephone business in 1897 by the predecessor of The Pacific Telephone and Telegraph Company in the Accounting Department, and has ever since been and is now in the employ of said company in its Accounting Department. That since April, 1912, he has held the [fol. 204] position of Auditor of Disbursements, and since July, 1922, in the absence, on account of illness, of the General Auditor, has been Acting General Auditor of said company, and as such has had complete charge of all its accounts and accounting systems, and is thoroughly familiar with the same.

That the accounts of the plaintiff are and have been since January 1, 1913, kept in accordance with accounting regulations prescribed by the Interstate Commerce Commission and adopted by the Public Service Commission of Washington, now the Department of Public Works of Washington.

That the statements as to costs hereinafter setout contain nothing on account of franchises or on account of the item known as going concern value.

1919

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service in the State of Washington (not including Spokane) during the year 1919 amounted to 4.97 per cent; for its Seattle Exchange, 3.97 per cent, and for its Tacoma Exchange, .98 per cent, of the cost of its property used or useful in and devoted exclusively to the rendition of said service, [fol. 205] including necessary working assets. That a statement showing said costs and the results of said operations for 1919 is as follows:

Average Cost of Property

	State of Washington	Seattle	Tacoma
Average Plant and Equip..	$16,853,149	$7,262,230	$2,505,850
Average Working Assets..	865,027	502,197	168,215
Total	$17,718,176	$7,764,427	$2,674,065

Telephone Revenues

	State of Washington	Seattle	Tacoma
Exchange Service	$4,080,851	$2,521,732	$632,616
Toll Service	1,496,650	131,542	47,981
Miscellaneous	111,746	67,129	18,233
Total Tel. Rev. ...	$5,689,247	$2,720,403	$698,830

Telephone Expenses

	State of Washington	Seattle	Tacoma
Current Maintenance	$926,226	$429,988	$107,365
Deprec. & Amortization...	951,580	404,431	146,249
Traffic	1,731,529	1,008,858	242,323
Commercial	451,390	216,922	70,845
Gen. and Misc.	127,973	54,284	14,129
Uncollectible Opr. Rev. ..	19,037	10,071	3,898
Taxes	320,114	151,199	58,091
Rent Deductions	48,992	23,133	570
Licensee Con. Exprs.	232,194	113,156	29,022
Total Tel. Exps. ..	$4,809,035	$2,412,042	$672,492
Net Tel. Rev.	$880,212	$308,361	$26,338
Per Cent Net Rev.	4.97%	3.97%	.98%

[fol. 206] 1920

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service in the State of Washington (not including Spokane) during the year 1920 amounted to 4.42 per cent; for its Seattle Exchange, 1.85 per cent, and for its Tacoma Exchange, .89 per cent, of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operations for 1920 is as follows:

Average Cost of Property

	State of Washington	Seattle	Tacoma
Aver. Plant & Equip.....	$18,308,353	$8,189,216	$2,560,603
Average Working Assets..	859,853	517,584	154,930
Total	$19,168,206	$8,706,800	$2,715,533

Telephone Revenues

	State of Washington	Seattle	Tacoma
Exchange Service	$4,720,104	$2,954,291	$706,066
Toll Service	1,770,351	154,496	51,537
Miscellaneous	165,524	112,673	23,637
Total Tel. Rev.	$6,655,979	$3,221,460	$781,240

Telephone Expenses

	State of Washington	Seattle	Tacoma
Current Maintenance	$1,203,122	$604,521	$127,385
[fol. 207] Deprec. & Amortization	1,007,652	449,841	153,050
Traffic	2,063,147	1,262,851	260,892
Commercial	508,198	254,804	74,224
Gen. and Misc.	150,925	62,675	15,783
Uncollectible Opr. Rev. ..	15,521	9,988	1,935
Taxes	524,811	252,152	89,049
Rent Deduction	55,601	26,108	1,202
Licensee Con. Exps.....	280,262	137,328	33,527
Total Tel. Exps....	$5,809,239	$3,060,268	$757,047
Net Tel. Rev.	$846,740	$161,192	$24,193
Per Cent Net Rev.	4.42%	1.85%	.89%

1921

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service in the State of Washington (not including Spokane) during the year 1921, amounted to 3.30 per cent, for its Seattle Exchange, .69 per cent, and for its Tacoma Exchange, .58 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operations for 1921 is as follows:

Average Cost of Property

	State of Washington	Seattle	Tacoma
Average Plant and Equip..	$21,614,809	$10,804,927	$2,634,648
Aver. Working Assets	905,017	608,326	129,566
Total	$22,519,826	$11,413,253	$2,764,214

[fol. 208]

Telephone Revenues

	State of Washington	Seattle	Tacoma
Exchange Service	$4,928,482	$3,058,001	$746,517
Toll Service	1,804,994	165,137	48,900
Miscellaneous	199,845	136,270	25,008
Total Tel. Rev.	$6,933,321	$3,359,408	$820,425

Telephone Expenses

	State of Washington	Seattle	Tacoma
Current Maintenance	$1,355,555	$716,729	$154,344
Deprec. & Amortization ..	1,145,603	543,335	159,725
Traffic	2,092,265	1,240,379	268,968
Commercial	595,316	311,099	84,898
Gen. and Misc.	155,177	65,770	16,329
Uncollectible Opr. Rev. ...	27,929	17,319	3,180
Taxes	467,520	216,776	79,472
Rent Deductions	59,348	25,430	2,127
Licensee Con. Exps.....	292,066	143,456	35,355
Total Tel. Exps. ..	$6,190,719	$3,280,293	$804,398
Net Tel. Rev.	$724,602	$79,115	$16,027
Per Cent Net Revenue	3.30%	.69%	.58%

1922

That the net return earned by the plaintiff through its telephone ates and the rendition of its telephone service in the State of Wash- ngton (not including Spokane) during the year 1922 amounted to 17 per cent, for its Seattle Exchange, .19 per cent, and for its Tacoma Exchange, .89 per cent of the cost of its roperty used or [fol. 209] useful in and devoted exclusively to the rendition of said ervice, including necessary working assets. That a statement show- ng said costs and the results of said operations for 1922 is as follows:

Average Cost of Property

	State of Washington	Seattle	Tacoma
Aver. Plant and Equip. ..	$26,139,600	$14,566,256	$2,712,966
Aver. Working Assets	1,013,122	709,509	131,646
Total	$27,152,722	$15,275,765	$2,844,612

Telephone Revenues

	State of Washington	Seattle	Tacoma
Exchange Service	$5,131,823	$3,179,771	$768,732
Toll Service	2,011,296	204,787	54,497
Miscellaneous	233,001	164,541	27,045
Total Tel. Rev.	$7,376,120	$3,549,099	$850,274

Telephone Expenses

	State of Washington	Seattle	Tacoma
Current Maintenance	$1,329,653	$716,322	$152,667
Deprec. & Amortization ..	1,297,881	660,148	164,154
Traffic	2,180,554	1,316,954	278,430
Commercial	669,843	356,617	90,867
Gen. and Misc.	186,558	78,101	19,728
Uncollectible Opr. Rev. ..	27,250	18,008	3,813
Taxes	468,075	214,897	77,150
Rent Deductions	47,376	8,895	1,485
Licensee Con. Exps.	307,363	149,684	36,532
Total Tel. Exps. ..	$6,514,553	$3,519,626	$824,826
Net Tel. Rev.	$861,567	$29,473	$25,448
Per Cent Net Rev.	3.17%	.19%	.89%

[fol. 210] That the amounts by which the net telephone revenues derived by the company from its telephone business in the State of Washington (not including Spokane), in Seattle and in Tacoma fall short of a return of 8 per cent upon said cost of the property used or useful in and devoted to the rendition of said telephone business are as stated below for the respective periods indicated:

	State of Washington	Seattle	Tacoma
Year 1919	$537,242	$312,793	$187,587
Year 1920	686,716	535,352	193,050
Year 1921	1,058,984	833,945	205,110
Year 1922	1,310,651	1,192,588	202,121

C. S. Casassa.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen. Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 211] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. E. FLEAGER—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, C. E. Fleager, being first duly sworn, depose and say: That I am the C. E. Fleager who made the affidavit herein as to value verified the 19th day of April, 1923.

That the property used by the plaintiff in the rendition of its service is classified under the system of accounts prescribed by the Interstate Commerce Commission, the so-called depreciable property [fol. 212] being shown under the following items, with the account numbers as indicated:

212. Buildings.
221. Central Office Telephone Equipment.
222. Other Equipment of Central Offices.
231. Station Apparatus.
232. Station Installations.
233. Interior Block Wires.
234. Private Branch Exchanges.
235. Booths and Special Fittings.
241. Exchange Pole Lines.
242. Exchange Aerial Cable.
243. Exchange Aerial Wire.
244. Exchange Underground Conduits.
245. Exchange Underground Cable.
246. Exchange Submarine Cable.

251. Toll Pole Lines.
252. Toll Aerial Cable.
253. Toll Aerial Wire.
254. Toll Underground Conduit.
255. Toll Underground Cable.
256. Toll Submarine Cable.
261. Office Furniture and Fixtures.
262. General Shop Equipment.
263. General Store Equipment.
264. General Stable and Garage Equipment.
265. General Tools and Implements.

That, in the rendition of its service, the plaintiff uses up the property of the classes indicated in the foregoing classification. [fol. 213] For instance, a switchboard, which under the above classification, would come under the head of central office equipment, Account No. 221, will have a certain useful life in the rendition of the company's service, at the expiration of which it will be discarded.

Among the causes which end the useful life of any piece of depreciable property are natural wear and tear, obsolescence, the fact that it becomes inadequate for the service required of it, public requirements, that is, requirements of public authorities that render necessary changes in plant, storms, fires and other casualties.

When property is discarded, usually more or less salvage is realized from it. Under the said accounting rules and practices the term "net salvage" means the net amount realized from the discarded property; that is, the amount realized from it, less the cost of removing and disposing of it.

The amount of this net salvage will obviously vary radically with the different classes of property. For instance, if it were necessary to take down an old pole line, probably the cost of taking the pole line down would amount to more than the poles could be sold for [fol. 214] so that here the net salvage would be a minus amount. On the other hand, in the case of the switchboard, the net salvage would be a substantial amount, although the fact that the relatively large item of labor incidental to its original installation would be entirely lost, would tend to minimize such net salvage.

The cost of depreciable property used up in the rendition of the plaintiff's exchange service, less the net salvage recovered on account of this property when it is discarded, is a part of what it has cost the plaintiff to render this service during the term of the useful life of the property in question.

Under the said accounting rules and practices and under the accounting rules of the Department of Public Works of Washington, the plaintiff is required to charge this cost or expense to its operating expenses, except certain minor items charged initially to certain clearing accounts, in equal periodical increments during the useful life of the property, and this is done month by month. At the time that this charge is made to operating expenses a corresponding credit

is made to the account entitled "Reserve for Accrued Depreciation."

When a piece of property is discarded, this account "Reserve for [fol. 215] Accrued Depreciation" is charged with the difference between the cost of this property and the net salvage recovered from it. At the same time the proper fixed capital account is reduced by the amount of the original cost of the property in question.

This cost of rendering plaintiff's service is treated in the accounts in the same manner in which other cost items extending over a considerable period are treated. In the cases of taxes covering a year or interest covering a fixed period, or expenses of financing and bond discounts covering a number of years, the total expense is ascertained and is then charged to the operating expenses and credited to the account entitled "166—Taxes Accrued," or "167—Accrued Liabilities Not Due," as the case may be, against which account the payment when made is charged in a lump. In none of these cases is any specific reserve actually set aside.

While the depreciation account is entitled "Reserve for Accrued Depreciation," no reserve in the sense of a fund set aside for this specific purpose is maintained. The moneys taken out of earnings and represented by these charges to operating expenses and credits to this account go into the general funds of the plaintiff and find their way into property and plant owned by it so that as parts of its [fol. 216] investment are retired, they are replaced by other investments in a like amount and its capital is maintained unimpaired.

The factors which determine the amount which should be periodically charged to the operating expenses and credited to the account "Reserve for Accrued Depreciation" are the original cost of the property, the net salvage, the term of its useful life, and the co-efficient of safety which good business management requires in cases where expense items are to be met, the amount of which cannot be exactly known in advance. The original cost is readily and definitely ascertainable. What will be the useful life of any piece of telephone property and what will be the net salvage recovered upon the termination of this life, are factors looking to the future which must necessarily be based upon estimates founded upon the judgment of those educated in the business applied to the recorded experience of the company over a long series of years.

While the exact time when any specific piece of property will go out of use may not be accurately determinable, the average useful lives of the various classes of property are factors which may be fixed with substantial accuracy and this is true also as to the determi- [fol. 217] nation of the net salvage. These determinations should be reviewed from time to time and where there are changes in conditions or in the character of the plant which appears to be more than temporary so as to affect substantially these averages, corresponding adjustments should be made.

During the last six years it has been part of my duty to study continuously the facts bearing upon these factors of useful life and net salvage, for use as a basis for revision of charges to operating expenses and credits to accounts "Reserve for Ac-rued Depreciation" when changed conditions made the same proper. The last such revision

made effective the 1st day of August, 1919, produced a reduction in the composite rate previously in effect and applied to present depreciable property in the State of Washington from 6.23 per cent to 5.84 per cent.

That in the contract made between the Postmaster General and the plaintiff in connection with the federal possession, control and operation of the plaintiff's property during the year from August, 1918, to August, 1919, the comparable composite rate for the charges to operating expenses and clearing accounts and credits to the account "Reserve for Accrued Depreciation" was fixed at 5.72 per cent except [fol. 218] that the item of Right of Way, Account No. 207, was not included in this composite rate but was carried separately with a depreciation rate of 2.55 per cent. This item is small and would not materially affect the said figure of 5.72 per cent. This composite figure was applied to plaintiff's total depreciable property during the year of federal operation.

That upon the termination of federal operation on August 1, 1919, plaintiff put into effect the rates of depreciation shown below and these rates have been continued in effect up to this time:

Depreciation Rates in Effect Since August 1, 1919

212. Buildings	3.0
Cable, Aerial:	
242. Exchange	5.4
252. Toll	5.0
Cable, Underground:	
245. Exchange	3.0
255. Toll	2.8
Cable, Submarine:	
246. Exchange	8.0
256. Toll	8.0
221. Central Office Equipment	8.0
222. Other Equipment of C. O.	8.0
[fol. 219] Conduit, Underground:	
244. Exchange	2.7
254. Toll	2.0
261. Office Furniture and Fixtures	10.0
Pole Lines:	
241. Exchange	10.0
251. Toll	6.1

207.	Right of Way:	
	Exchange	2.55
	Toll	2.55
	Station Equipment:	
231.	Station Apparatus	8.0
232.	Station Installations	
233.	Interior Block Wires	
234.	Private Branch Exchanges	8.0
235.	Booths & Spl. Fittings	8.0
262.	General Shop Equipment	10.0
263.	General Store Equipment	10.0
264.	General Stable and Garage Equipment	20.0
265.	General Tools & Implements	20.0
	Wire, Aerial:	
243.	Exchange	10.0
253.	Toll	3.8

That the composite rate resulting from the application of the above specific rates to the depreciable property in the State of Washington was 5.70 per cent for the year 1920, 5.76 per cent for the year 1921, and 5.71 per cent for the year 1922.

[fol. 220] That under the regulations of the Interstate Commerce Commission plaintiff is required to file an annual report as of December 31st, showing, among other things, the composite rate of depreciation charged during the year. Plaintiff has so filed the composite rate so charged for each year.

That the amendment to Paragraph 5 of Section 20 of the Interstate Commerce Act, made by Section 435 of the Transportation Act, 1920, became effective on February 28, 1920, and that in the exercise of the authority vested in the Interstate Commerce Commission by said amendment to the Interstate Commerce Act, on March 18, 1920, it issued the following order:

"Interstate Commerce Commission, Washington

March 18, 1920.

To all carriers concerned:

"Section 435 of the Transportation Act, 1920, contains the following provision:

"'The Commission shall, as soon as practicable, prescribe for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall be charged with respect to [fol. 221] each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when

it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.'

"Information received by the Commission indicates the existence of doubt as to the propriety of carriers making any charges to operating expenses with respect to depreciation prior to such time as the Commission shall prescribe the specific percentages of depreciation which shall be charged.

"The purpose of this circular is to dispel any such doubt as may exist in the minds of accounting officers.

"Until the Commission shall otherwise order, all carriers subject to the Act to regulate commerce should continue to observe the requirements respecting the accounting for depreciation which are embodied in the effective accounting classifications prescribed by the Commission for the respective classes of carriers.

"George B. McGinty, Secretary."

[fol. 222] That in order to carry out the provisions of said Section 20, as amended, the Interstate Commerce Commission organized a subdivision of its bureau of accounts, which is designated as the depreciation section, with Mr. Frank S. Fowler as chief for the purpose of aiding the commission in carrying out the provisions of said section as amended.

That for over a year last past, the said depreciation section has been conducting an investigation of the subject, preliminary to public hearings, which the commission has indicated its purpose to hold with reference to this matter. In connection with this investigation Mr. Charles A. Heiss, Comptroller of the American Telephone and Telegraph Company, has been authorized to represent the Bell System companies, including the plaintiff, before the depreciation section.

That on January 6th, 1921, the said Mr. Fowler addressed to the said Mr. Heiss a letter, copy of which follows:

[fol. 223] "Interstate Commerce Commission, Bureau of Accounts

Washington

"January 6, 1921.

"Mr. Charles A. Heiss, Comptroller American Telephone & Telegraph Co., 195 Broadway, New York, New York.

DEAR SIR:

"Section 20 of the Interstate Commerce Act, as amended February 28, 1920, requires the Interstate Commerce Commission to prescribe for carriers subject to the Act, the classes of property for which

depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall be charged with respect to each of such classes of property.

"For the purpose of carrying out these requirements a preliminary investigation of the depreciation question is being conducted to secure all information possible to formulate recommendations which will be made public and fully considered at public hearings before the Commission takes the final steps required by the act.

"In view of the magnitude of this subject and its paramount importance it is desired that all interested persons be given an opportunity to present their views and you are therefore requested to submit, with as little delay as possible, a statement or brief representing the opinion of your company with respect to the classes of depreciable property (by groups if practicable), the method of ascertaining [fol. 224] the service life and salvage value, the basis upon which depreciation charges should be accrued, the necessity for accruals, the relation of maintenance charges to depreciation and the manner in which the percentages of depreciation applicable to the several classes of property should be determined.

"It is also desired that you incorporate in the statement any suggestions or procedures which in your judgment will aid the Commission to reach a just and reasonable determination of the questions involved.

"It will be much appreciated if you will advise me of the approximate date of your statement may be expected.

"Yours very truly, Frank S. Fowler, Chief of Depreciation Section."

That in response to this letter, Mr. Heiss wrote Mr. Fowler, under date of March 24th, 1921, setting forth in behalf of the Bell System the view, opinions and suggestions endorsed by those companyies, responsible to the third and fourth paragraphs of the above letter.

That the rates put into effect on August 1, 1919, when the federal government surrendered the possession and control of plaintiff's property, as above set forth, have been maintained in effect pursuant to said order up to the present time.

[fol. 225] That under date of December 30, 1921, pursuant to the requirement of the Interstate Commerce Commission, plaintiff filed with said Commission the said specific rates of depreciation so put into effect on August 1, 1919.

That under date of March 10, 1923, the Interstate Commerce Commission issued an Order No. 14760, setting the date of May 1, 1923, at 10:00 A. M. at Washington, D. C., for the beginning of the presentation of evidence. That said Order had attached thereto a report of the preliminary investigation of depreciation charges of telephone companies and the conclusions and recommendations of the depreciation section for the regulation of such charges.

That in the meantime the plaintiff has been and is now co-operating with Mr. Heiss in an endeavor to furnish the data necessary to enable the Commission to prescribe, under the Act of Congress afore-

said, the classes of plaintiff's property for which depreciation charges may properly be included under operating expenses and the percentage of depreciation which shall thereafter be charged by the plaintiff with respect to each class of property.

[fol. 226] That the "Reserve for Accrued Depreciation" of the plaintiff company as of December 31, 1922, is accrued and accounted in common with respect to all its property in the States of Washington, Oregon, California and Idaho and is not more than sufficient for the telephone property that is owned and is being operated by the said company throughout its said territory, of which the property in Washington is an integral part.

That if the reserve could be divided among the states on the basis of plant values or cost that the resultant proportionate reserve for Washington is not more than sufficient for that property. If such a separation could be made a corresponding separation would neces-arily have to be made in other accounts and transactions of the Company. The financial results of the business in the State of Washington over the period of accumulation of the reserve have been such as to make impossible the accruing of any such proportion of the Company's Depreciation Reserve had Washington's proportion of the necessary interest and dividend payments been realized from the business in that State.

To compare the reserve for accrued depreciation with the amount [fol. 227] of physical depreciation existing in the plant, as the majority opinion undertakes to do, is to compare factors which are not comparable, for the reason that physical depreciation, commonly referred to as per cent condition, is a factor of present physical condition, and as such is but one of the many factors to be considered from the view point of current expense of depreciation, which is the problem of distributing the total amount there concurrently month by month over the life in service of the plant by a proper recognition in current expenses.

As heretofore pointed out, the so-called reserve here under discussion is in fact a debit account and not a source of current funds for this or any other purpose; and the resources indicated thereby are in fact among the general assets of the Company and to deny a current expense by recourse to these assets, which is the necessary result of carrying the order of majority of the Department into effect, is to compel the meeting of a current expense by a recourse to plaintiff's general assets and an arbitrary dissipation of plaintiff's assets in lieu of providing current rates sufficient to meet the current expense of depreciation.

That, in my judgment, a rate of depreciation of three and one-[fol. 228] half per cent is totally inadequate and insufficient to cover the expense of depreciation that is and will be experienced in the property in the State of Washington. That said rate of three and one-half per cent is stated by the majority order to be designed to decrease the amount of the reserve which is erroneous in principle in that it admittedly does not cover for the period in question the pro rata of the amount of depreciation actually to be experienced.

That from numerous studies and calculations I have never found from the actual experience of the company a rate in the aggregate of less than five and one-quarter per cent.

C. E. Fleager.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 229] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF P. H. COOLIDGE—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

P. H. Coolidge, being first duly sworn, deposes and says: That he is a graduate of the Massachusetts Institute of Technology in the class of 1894. That he has been employed by the Pacific Telephone and Telegraph Company since August 1, 1909, and prior to that time, from 1897, was employed by the Western Electric Company, and [fol. 230] that he has had more than twenty-five years' experience in the telephone business.

That since August 1, 1911, he has been General Commercial Superintendent of The Pacific Telephone and Telegraph Company, in which position he has charge and supervision of the making of schedules of rates for that company and the preparation of studies in relation thereto, including studies of the effect of rates on the revenue of the company. That he is familiar with all the rates and charges which are made by The Pacific Telephone and Telegraph Company for telephone service and facilities furnished by that company and with the schedules of such rates which are now and have been from time to time filed by that company with the Department of Public Works of Washington and its predecessors, the Public Service Commission of Washington, and with the various changes in rates, so filed, which have from time to time been made. That the exchange rates which The Pacific Telephone and Telegraph Company now has in effect for telephone service in the State of Washington, including Seattle and Tacoma, have been continuously in effect since March 1, 1919, and that the toll rates now in effect have been continuously in effect since January 21, 1919.

[fol. 231] That he is familiar with the order of the Department of

Public Works of Washington, dated March 31, 1923, signed by two members of said Department, and also with the order made on the same date, signed by the third member of said Department.

That he has made a careful estimate of the revenue which will be derived by The Pacific Telephone and Telgraph Company in the State of Washington (not including Spokane) for the year 1923, in the event that the rates, both toll and exchange, now and since 1919 in effect shall continue in effect throughout said year, taking into consideration the probable growth in the number of telephones which will be experienced and the growth in the toll business. That he has made a similar estimate for the year 1923 of the revenue which will be experienced by The Pacific Telephone and Telegraph Company and derived from its Seattle and Tacoma Exchanges, in the event that said rates now and since 1919 in effect shall continue in effect throughout the year 1923. That as a result of this estimate, in his opinion, the revenue of The Pacific Telephone and Telegraph Company for the State of Washington (not including Spokane), which will be derived under the present rates for the year 1923, will [fol. 232] be the sum of $8,068,071.20 and the revenue which will be derived for the same period and under existing rates for Seattle will be the sum of $3,806,034.50, and for Tacoma will be the sum of $893,660.20.

That he has also made an estimate of the effect on the revenues of The Pacific Telephone and Telegraph Company in the State of Washington (not including Spokane) and for Seattle and Tacoma for the year 1923, if the rates, both toll and exchange, fixed in the minority order of March 31, 1923, were in effect throughout said year; and from this estimate has determined that, if the rates, both toll and exchange, fixed in the minority order of March 31, 1923, were in effect for the year 1923, the revenue of The Pacific Telephone and Telegraph Company from its business in the State of Washington (not including Spokane) for that year would be the sum of $9,237,391.24, and for Seattle $4,539,284.45, and for Tacoma, $1,016,801.90. That, in his opinion, the return to the Pacific Company, even under the minority rates, while greater than under the rates now and since 1919 in effect, would be less than sufficient and less than the return to which the Pacific Company is entitled upon its property used and useful in rendering telephone service therein, and that the service to be had by subscribers under those rates [fol. 233] would be worth more to them than the charges therefor.

That he has had a long experience in making estimates of the amount of revenue to be derived under different schedules of rates for varying periods in the future, and it has been his experience that estimates so made by him approximate closely the results actually experienced. That, in his opinion, the estimates made by him for the State of Washington (not including Spokane), for Seattle and Tacoma for the year 1923, under the two schedules of rates as hereinabove set forth, are substantially correct and that the results actually experienced or to be experienced thereunder would not vary to any material extent from the said estimates.

P. H. Coolidge.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 234] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF HENRY L. GRAY—Filed Apr. 24, 1923

STATE OF WASHINGTON,
County of King, ss:

I, Henry L. Gray, being first duly sworn, depose and say:

My age is forty-two years. I was educated at the University of Missouri. I reside at Seattle, Washington, where I maintain an office at 840 Henery Building, from which I engage in the prac-[fol. 235] tice of civil and electrical engineering specializing in the valuation of public utility properties; in rate and service investigations and reports on public utilities for investment houses. My engineering training and experience extend over a period of approximately twenty-four years. My preliminary training was acquired in connection with telephone and railroad construction. For the past sixteen years, I have continuously engaged in work involving valuations of properties of public service corporations, a general outline of such work being as follows:

In 1906, I was employed by the Railroad Commission of Washington as Assistant Engineer in connection with the valuation of railways then being conducted by that state. In 1908, I became Chief Engineer; and in 1911, and through a change of name of the regulatory body, I became Chief Engineer of the Public Service Commission of Washington, and continued in that capacity until February 1, 1913. My work with the Railroad Commission and Public Service Commission of Washington consisted to a large extent of the valuation of public utility properties of all kinds, including telephone properties, and in public utility rate and service investigations.

[fol. 236] On February 1, 1913, I opened my office in Seattle as a consulting engineer, specializing in public utility work; and since that date my work has consisted practically altogether of valuations and rate and service investigations for public utilities, municipalities and regulatory bodies, and in the preparation of reports on existing and proposed public utility projects for investment houses. My work as engineer in private practice has called for a close study of

the subject of the valuation of public utility properties, and has required my appearance in valuation and rate cases before the regulatory bodies of Washington, Oregon, Idaho, California and Illinois, as well as before special commissions in Canada.

In my work, since 1906, I have appraised sixty-three different public utility properties. In the case of nine of these properties, I acted as principal assistant to the engineer in charge; while in the case of the remaining fifty-four properties, which represented an investment of more than Five Hundred Million Dollars ($500,000,000), I was engineer in charge of all work. Of these fifty-four properties, ten were telephone systems, consisting of the plant of the Independent Telephone Company of Seattle, the plants of the Northwest Tele- [fol. 237] phone Company in Snohomish County, Washington, and the plants owned by The Pacific Telephone and Telegraph Company in Seattle, Spokane, Tacoma, Everett, Bellingham, Centralia, Olympia and Bremerton, all in the State of Washington. In addition, I have been connected in a consulting capacity with a number of other appraisals, generally for the purpose of appraising some particular class of property, or investigating some particular feature of the case. I am familiar with the methods employed by experts, commissions and courts in arriving at the values of public utilities, and with the general trend of labor and material costs.

Since May 1, 1922, I have been continually engaged in an examination of the property and affairs of The Pacific Telephone and Telegraph Company within the State of Washington, and in a determination of the value of the property devoted to public use by such company in that state. As the result of this investigation, I am convinced that the value of such property (excluding Spokane) on the 31st day of December, 1922, was in excess of Thirty-five Million Two Hundred Fifty Thousand Dollars ($35,250,000.00). My reasons for this conclusion are as follows:

[fol. 238] The value of the property in question will be represented by its reasonable reproduction cost, less accrued depreciation, plus a fair allowance for what is ordinarily known as going value. Due to the sudden and unprecedented increase in construction costs following the beginning of the World War, and to the possibility that such high prices may continue for a considerable period, it is admittedly difficult to arrive at what might be called a reasonable reproduction cost. Diagrams "A" and "B" attached hereto show that during the period from the end of the panic, in 1896, to about the beginning of the year 1915, there was a steady and almost uniform increase in the costs of labor and materials, as evidenced by the Wholesale Commodity Price Index Numbers, computed and published by the United States Bureau of Labor Statistics. But following the year 1915, there was a heavy increase in labor and material costs, the peak of such costs being reached about the middle of the year 1920. Following this peak, there was a marked decline in prices, which continued until about the beginning of the year 1922; but since the early part of that year, there has been a general increase in wholesale commodity prices and a very substantial

increase in the costs of labor and materials entering into construction. [fol. 239] On April 1, 1923, the average cost of construction labor and materials was approximately thirty per cent higher than the corresponding costs of April, 1922, and were only twenty-two per cent less than the peak costs of 1920. The present trend of prices is decidedly upward, and this condition has existed for more than a year. It is impossible to predict to what extent this increase will continue, but at the present time there is no indication of any recession in construction or maintenance costs. On the contrary, all of the data available indicates a still further increase in such costs, as labor costs in general are advancing. It is difficult to abandon the idea that present-day costs eventually will recede, but as to when this will occur, no one can say; and it is generally conceded that a new price level has been established and that construction costs never again will reach pre-war levels. Under the circumstances as recited, the difficulties of arriving at what might be termed "a reasonable reproduction cost" are obvious.

The reproduction cost of the property in question, as of June 30, 1922, less accrued depreciation, and plus a reasonable allowance for going value, was stated by The Pacific Telephone and Telegraph Company to be Forty-two Million Eight Hundred Forty-five Thou- [fol. 240] sand One Hundred Eighty-nine Dollars ($42,845,189). I have made a study of this reproduction cost estimate, of the going value calculation and of the accrued depreciation in question, and am convinced that the above amount, or $42,845,189, stated by The Pacific Telephone and Telegraph Company to represent the reproduction cost of its property within the State of Washington (excluding Spokane) as of June 30, 1922, less accrued depreciation and plus going value, is reasonable, fair and conservative. This, if added to the cost of additions to the property of the said company within the State of Washington between the dates of June 30, 1922, and December 31, 1922, which I find to have been $1,116,896.00, would give a resulting reproduction cost less depreciation plus going value, as of the latter date, of $43,962,085.00. In the absence of any unusual conditions, this might be considered to be the fair value of the property in question.

It is my opinion that in fixing value, the possibility of an ultimate recession in prices must be taken into consideration; and that to base the value of a property solely upon labor and material costs of the present would be unwise; and that in arriving at such value the [fol. 241] construction costs of the present would be unwise; and that in arriving at such value the construction costs of the present should be discounted to some extent—and the determination of the proper discount is the problem.

Diagram "B" attached hereto shows the general similarity of the graphs of Wholesale Commodity Price Indices, during the years 1914 to 1923, inclusive, as computed and published by the Bureau of Labor Statistics, and the corresponding Construction Cost Indices computed and published by the Engineering News-Record. Diagram it is apparent that had the World War not occurred, that prices indices during the period from 1890 to 1923; and from this dia-

gram it is apparent that had the World War not occurred, that prices might have been expected to follow the general upward trend indicated by the Trend Grade Line from the end of the panic in 1896 to the beginning of the year 1915; and that therefore on June 30, 1922, commodity prices in general would have been approximately thirty-eight points or twenty-four per cent less than the corresponding prices actually prevailing upon that date.

Applying a reduction factor of twenty-four per cent to the reproduction cost less depreciation of the property in question as of June 30, 1922, and adding a reasonable allowance for going value, [fol. 242] would result in a total of $34,137,400.00, which, when there is added thereto the cost of additions to the property of the said company within the State of Washington (excluding Spokane) during the last six months of the year 1922, or $1,116,896.00, will give a total of $35,254,296.00. Therefore I believe that the fair value of the property in question, or that owned within the State of Washington (excluding Spokane) and used for the public convenience by The Pacific Telephone and Telegraph Company on December 31, 1922, is in excess of $35,250,000.00.

Henry L. Gray.

Subscribed and sworn to before me this 23rd day of April, 1923. J. E. Peterson, Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

(Here follow Diagrams A and B, marked side folio pages 243 and 244)

[fol. 245] In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Affidavit of Ralph H. Macmichael—Filed Apr. 24, 1923

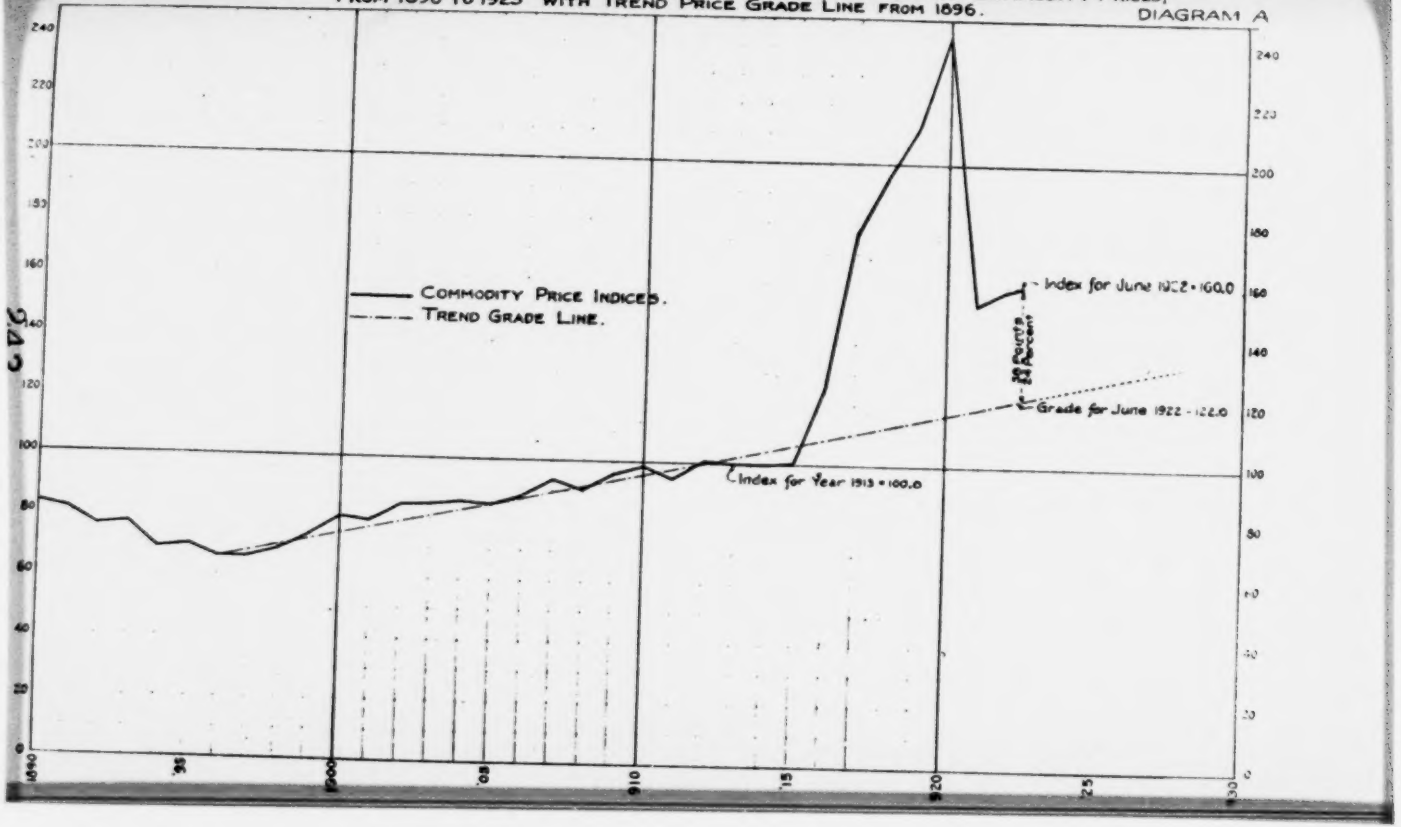
State of Washington,
County of King, ss:

Ralph H. Macmichael, being first duly sworn, says that he resides at East Seattle, Washington; that he has been engaged in the banking business for more than twenty years; that he is Vice President of the Dexter Horton National Bank of Seattle, with which institution he has been connected for more than ten years, and that during [fol. 246] this time he has been directly in charge of the Bond Department of said bank, which deals in investment securities of the classes offered to what are known in banking circles as the conservative investor, and that a very large part of this business con-

GRAPH SHOWING AVERAGE YEARLY INDICES (OLD NUMBER) OF WHOLESALE COMMODITY PRICES

GRAPH SHOWING AVERAGE YEARLY INDICES (OLD NUMBERS) OF WHOLESALE COMMODITY PRICES, FROM 1890 TO 1923 WITH TREND PRICE GRADE LINE FROM 1896.

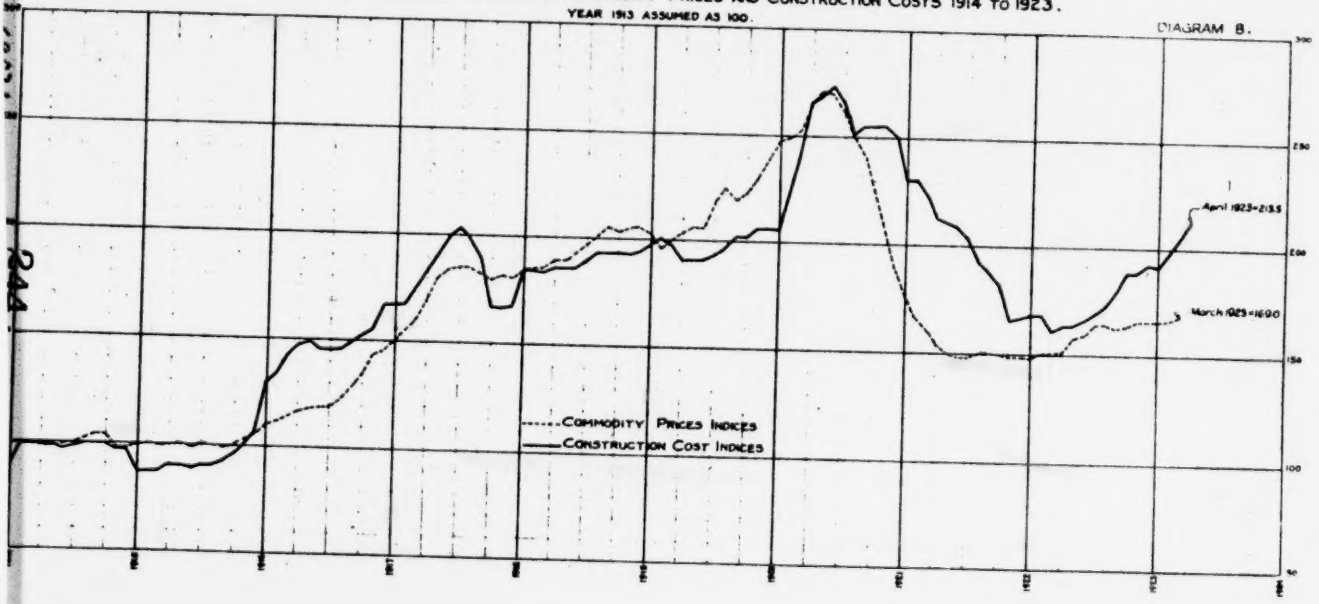
DIAGRAM A



GRAPHIC COMPARISON OF WHOLESALE COMMODITY PRICES AND CONSTRUCTION COSTS 1914 TO 1923.

YEAR 1913 ASSUMED AS 100.

DIAGRAM B.



sists in the handling of public utility securities; that the handling of such securities necessitates constant investigations into the operations, properties, earnings and securities of electric, gas, telephone, street railway and other public utilities.

That it is the opinion of the deponent that a public utility such as the plaintiff should earn an annual return of not less than eight (8) per cent (after providing for depreciation) upon the fair and reasonable value of its property used or useful in the rendition of its service in order to place its securities upon a parity with other investments competing for funds in the market.

That in order to make the securities of a public utility saleable, it is necessary that public confidence in such securities be established and maintained. The investors must have reasonable assurance of the integrity of the investment and the safety of their money, and must be afforded a return at least equal to the returns which they [fol. 247] could obtain through other available investments of similar desirability.

That the cost to public utilities of borrowed money, where the loans are adequately secured and where there is a fixed obligation to return the money borrowed at a definite date is obviously less than the fair return necessary to induce the investment of funds that are to be invested at the risk of the business. That the cost of borrowed money to public utilities during the last three years has run as high as ten (10) per cent for short term loans and has averaged well over six (6) per cent for long time money. That at present such corporations cannot obtain money on long time loans, even though adequately secured at less than an average cost of close to six (6) per cent. That prudence and conservatism dictate that only a proportion of the capital requirements of such corporations should raised by the sale of bonds or other loans. That it is fundamental that public utilities which expect to continue permanently in business and which are required continuously to increase their investments in order to meet the public service requirements imposed upon them, must have a market for their stocks, and their stocks are not salable to investors [fol. 248] unless it can be demonstrated that the company offering such stocks is earning and will continue to earn at least a reasonable return upon the value of its property devoted to the public use. That there is active competition among utility corporations, industries and other businesses for the surplus funds which are at any time available for new investments, and plaintiff, like the others, is compelled to meet this competition and to offer inducements to investors equal to those offered by others at the same time.

Ralph H. Macmichael.

Subscribed and sworn to before me this 23rd day of April, 1923. Maurice R. McMicken, Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

[fol. 249] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. J. PHILLIPS—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of King, ss:

I, W. J. Phillips, being first duly sworn, depose and say: That I am Division Commercial Superintendent of the plaintiff, The Pacific Telephone and Telegraph Company, and reside at Seattle, Washington; that I have been continuously employed by the plaintiff company and its predecessors for twenty-five (25) years; that since 1900 I have held my present position, or a similar position, in other sections of the company's territory;

That I have examined the records of the company and find that during the five months ending March 31, 1923, there were in the Seattle Exchange three thousand four hundred ninety-two (3,492) telephone stations disconnected for all reasons, an average of six hundred ninety-eight (698) per month; that in the Tacoma Exchange during the five months ending March 31, 1923, there were nine hundred ninety-eight (998) telephone stations disconnected for all reasons, which is an average of two hundred (200) per month; that the number of subscribers represented by these disconnected stations is available only after a lengthy analysis, but the number of subscribers is only slightly less than the number of stations.

That in the Seattle Exchange, as stated in the affidavit of Mr. J. C. Nowell, there are more than fifty-six thousand (56,000) subscribers; that of these 56,000 subscribers 24,726 are four-party residence subscribers, and 19,124 are individuals and two-party residence subscribers.

That in the Tacoma Exchange, as stated in the affidavit of Mr. J. C. Nowell, there are more than sixteen thousand (16,000) sub-
[fol. 250] scribers; that of these 16,000 subscribers 12,255 are two-party and four-party residence subscribers, and 801 are individual residence subscribers.

That during the year 1922 there was collected for long distance toll messages at the Seattle Exchange a sum in excess of forty-two thousand dollars ($42,000) from hotels. This sum is made up of many messages from 10 cents in price upward; that the particular person making the call is frequently unknown to the plaintiff company owing to the semi-public and public nature of these telephones; that there are in addition other telephones of a public and semi-public nature from which substantial sums of money are collected under the same circumstances; that if increased rates are not granted, it will be practically impossible to recover the difference between the present charge and a higher charge should it be deemed proper to recover it at a later date.

That during the year 1922 there was collected for long distance toll messages at the Tacoma Exchange, a sum in excess of eleven Thousand dollars ($11,000) from hotels. This sum is made up of many messages from 10 cents in price upward; that the particular

person making the call is frequently unknown to the plaintiff company owing to the semi-public and public nature of these telephones; that there are in addition other telephones of a public and semi-public nature from which substantial sums of money are collected under the same circumstances; that if increased rates are not granted, it will be practically impossible to recover the difference between the [fol. 251] present charge and a higher charge, would it be deemed proper to recover it at a later date.

W. J. Phillips.

Subscribed and sworn to before me this 30th day of April, 1923. Maurice R. McMicken, Notary Public in and for the State of Washington, Residing at Seattle. (Seal of Notary.)

[File endorsement omitted.]

[fol. 252] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

MOTION TO DISMISS—Filed Apr. 30, 1923

Come now the defendants E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, and each of them, and move the court to dismiss the bill of complaint filed herein for the reasons and upon the grounds that as appears upon the face thereof

I. Said bill of complaint does not state any matters of equity entitling the complainant to the relief prayed for.

II. Said bill of complaint does not state facts sufficient to entitle complainant to any relief against these defendants.

Wherefore defendants and each of them pray the judgment of this court whether they shall further answer, and that they be dismissed [fol. 253] with their costs.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 254] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

Come now the defendants E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, and each of them, and move the court for an order denying the application for an interlocutory injunction and declaring said restraining order to be void from its inception, and in the alternative, to dissolve said restraining order.

This motion is based on the files and records in the above entitled case, and upon the affidavit of E. V. Kuykendall, hereto attached.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants.

[fol. 255] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF E. V. KUYKENDALL—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of Thurston, ss:

E. V. Kuykendall, being first duly sworn, on oath deposes and says:

That he is one of the defendants named in the above entitled proceeding; that he is now and has been for more than three years last past the duly appointed, qualified and acting Director of the Department of Public Works of said state, and as such charged with the duty of administering the provisions of the "Public Service Commission Law" of said state and the acts amendatory thereof and supplementary thereto. That, during the incumbency of affiant as Director for said Department of Public Works, he has conducted, as provided by law, a large number of investigations involving the properties, rates and service of public utilities operating within the said state, and, in particular, of telephone companies, including plaintiff. That prior to his incumbency, the Public Service Commission of [fol. 256] Washington, predecessor of the Department of Public

Works of Washington, had conducted, as by law provided, a large number of investigations of the properties, rates and service of utilities generally and telephone companies operating within the said State. That these investigations have resulted in the accumulation of a large amount of date involving every feature of the construction, operation and maintenance of telephone properties within said state, and this data has at all times been available and has been used by the affiant and the staff working with him in the employ of the state of Washington for examination and comparison in investigations of the sort herein involved, and in particular with respect to the investigation which is the subject of this action. That the record made before defendants in the proceeding which is the subject of this action consists of 1,438 typewritten pages of testimony and some sixty exhibits, many of the latter being voluminous and containing technical calculations, all of which were given careful consideration.

That affiant has examined and is familiar with the bill of complaint and exhibits, and the affidavits in support of the bill of complaint, filed herein. That there is now and was at the time of the hearing before the Department of Public Works herein substantial agreement between the experts, engineers and accountants in the employ of the state of Washington and acting under the direction of affiant and the experts, engineers and accountants testifying for the plaintiff herein, with the following exceptions:

(a) Treatment of expense of depreciation;

(b) Treatment of compensation paid to the American Telephone and Telegraph Company.

[fol. 257] That the amount of the expense items above designated as (a) and (b) have a controlling effect upon the rate of return shown in any statement prepared to reflect the result of plaintiff's operations.

There are two general methods of determining the amount which should be charged to operating expenses on account of depreciation. One of these methods may be referred to as the "life table method." It is the method which has been used by plaintiff, and has resulted in the accrual of a balance in its "reserve for accrued depreciation" which amounts to approximately twenty-seven percent of the original cost of its depreciable property. Stated briefly, the application of the life table methods is substantially as follows:

A given group of plant units is found to have an average life in service of ten years, with no salvage value. It therefore follows, under a computation made on this basis, that the average annual rate of depreciation will be ten per cent. The amount obtained by application of this percentage is set aside annually in the depreciation reserve in order that when the property reaches the end of its useful life there may be in the reserve an amount equal to its original cost. This method inevitably results in building up a credit balance in reserve for the reason that, in a constantly growing plant, the annual retirements will not equal the annual credits to the reserve account.

The affidavit of one C. E. Fleager, on file herein, states in part as follows:

"The factors which determine the amount which should be periodically charged to the operating expenses and credited to the account 'reserve for accrued depreciation' are the original cost of the property, the net salvage, the term of its useful life, and the coefficient [fol. 258] of safety which good business management requires in cases where expense items are to be met, the amount of which cannot be exactly known in advance."

The Uniform System of Accounts, prescribed by the Interstate Commerce Commission for telephone companies and adopted by defendants for the keeping of accounts of companies such as plaintiff, provides as follows (p. 67):

"Depreciation of Plant and Equipment.—Telephone companies should include in operating expenses depreciation charges for the purpose of creating proper and adequate reserves to cover the expenses of depreciation currently accruing in the tangible fixed capital. By expense of depreciation is meant

"(a) The losses suffered through the current lessening in value of tangible property from wear and tear (not covered by current repairs).

"(b) Obsolescence or inadequacy resulting from age, physical change, or supersession by reason of new inventions and discoveries, changes in popular demand, or public requirements, and

"(c) Losses suffered through destruction of property by extraordinary casualties."

The classification of accounts duly and regularly promulgated by the defendants in compliance with law, and in which form plaintiff is required to keep its accounts, does not provide as an element of the expense of depreciation "a coefficient of safety which good business management requires in cases where expense items are to be met, the amount of which can not be exactly known in advance," nor is such an item of depreciation expense properly allowable.

The second method of determining expense of depreciation may be designated the "retirement method." In the application of this method a period of years of the past operations of the property is analyzed to determine the original cost of those items of the plant which have had to be replaced. The sum of these retirements for the period analyzed is divided by the number of years in the period, which gives an average annual retirement in dollars, that is to say, the actual average annual necessities of the utility in providing for re- [fol. 259] tirement of its property over the period analyzed is thus ascertained. This actual experienced expense, when related to the average plant value for the period, gives a depreciation percentage which, in a growing plant, is uniformly less than the annual percentage obtained by applying the life table method. Under the retirement method, the reserve, if it exists at all, is very small in its relation to the plant value.

Affiant states that the record made before defendants indicates that the rate for depreciation which plaintiff has heretofore used was too large and its application has resulted in the accrual of a reserve which is larger than the plaintiff's necessities require and is in ex-

cess of the amount the rate payer should be required to provide to cover expense of depreciation. Affiant further says that from the record made before defendants it appears that the property being currently installed by plaintiff is in large part property of longer life, and hence less rapidly depreciable, than the property heretofore installed; that, in view of this fact and the size of the depreciation reserve, as computed by plaintiff, and the necessary result of the calculation of the expense of depreciation resulting from the application of the method employed by plaintiff, a reduction in the rate of allowance for depreciation expense employed by plaintiff should be made for a period of two years in the future, and that such new rate of depreciation as set forth in the order herein is both reasonable and proper and subject to such future readjustment as the facts may warrant. The effect of this reduction over a period of two years will be to diminish the percentage relation of the depreciation reserve to the cost of the depreciable plant. After proper relation of the depreciation reserve to the cost of the depreciable plant has been once established, the charge to operating expenses on account of [fol. 260] depreciation can be more accurately determined.

Affiant says that in the bill of complaint filed herein there are certain allegations, and, in the supporting affidavits also filed herein, there are certain statements regarding the "cost of property," "book cost of property," "cost of reproduction" and "present fair value" of the properties of plaintiff. That neither in the bill of complaint nor in the supporting affidavits are the details and component figures of these various costs and values set forth, nor are the relation or comparison of these figures, costs and values to the rate base employed by affiant herein set forth. That in the entry of the order herein a rate base was determined by taking the original valuation of the properties of plaintiff as found prior to the instant proceeding before the defendants and adding thereto the net additions and beeterments up to the time of the inquiry. That the original valuation of these properties was unreviewed under the provisions of the Public Service Commission Law and has long since become conclusive. That the determination of the rate base by adding to the original valuation the net additions and betterments up to the date of the inquiry is the method of rate base determination provided by law in this case.

That affiant has read and is familiar with the contents of an affidavit of one C. S. Cassassa, filed herein. That said affidavit contains income statements for the years 1919, 1920, 1921 and 1922, showing the percent net revenue claimed to have been earned by plaintiff from its operations during said years. That affiant has caused these income statements to be changed in two respects and presents the results herewith. That said changes consist in (a) changing the amount of depreciation and amortization allowance to [fol. 261] an allowance of three and one-half percentum in accordance with the findings of fact made by the affiant herein, and (b) changing the amount of the allowance to the American Telephone and Telegraph Company under the so-called four and one-half per centum contract to an allowance of ninety cents per station in accordance with the findings of fact of the affiant herein.

[fol. 262] State of Washington

1919

Average Cost of Property

Total	$17,718,176	(unchanged)

Telephone Revenues

Total	$5,689,247	(unchanged)

(a) Telephone Expenses

Total	$4,809,035	(unchanged)
Reduction in Allowance for depreciation and amortization	331,444	
Total Telephone Expenses (Revised)	$4,477,591	
Net Telephone Revenues	$1,211,656	
Per cent. Net Revenues	6.84%	

(b) Telephone Expenses

Total	$4,809,035	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	129,911	
Total Telephone Expenses (Revised)	$4,679,124	
Net Telephone Revenues	$1,010,123	
Per cent. Net Revenues	5.70%	

(c) Telephone Expenses

Total	$4,809,035	(unchanged)
Reduction in Allowance for Deprec. and and Amort. and Licensee Con. Exps.	461,355	
Total Telephone Expenses (Revised)	$4,347,680	
Net Telephone Revenues	$1,341,567	
Per cent. Net Revenues	7.57%	

[fol. 263] State of Washington

1920

Average Cost of Property

Total	$19,168,206	(unchanged)

Telephone Revenues

Total	6,655,979	(unchanged)

(a) Telephone Expenses

Total	5,809,239	(unchanged)
Reduction in Allowance for Depreciation and Amortization	336,765	
Total Telephone Expenses, (Revised)	$5,472,474	
Net Telephone Revenues	$1,183,505	
Per cent. Net Revenues	6.17%	

(b) Telephone Expenses

Total	$5,809,239	(unchanged)
Reduction in allowance for Licensee Con. Exps.	168,059	
Total Telephone Expenses (Revised)	$5,641,180	
Net Telephone Revenues	$1,014,799	
Per cent. Net Revenues	5.29%	

(c) Telephone Expenses

Total	$5,809,239	(unchanged)
Reduction in Allowance for Deprec. and Amort. and Licensee Con. Exps.	504,824	
Total Telephone Expenses (Revised	$5,304,415	
Net Telephone Revenues	$1,351,564	
Percent. Net Revenues	7.05%	

[fol. 264] State of Washington

1921

Average Cost of Property

Total	$22,319,826	(unchanged)

Telephone Revenues

Total	6,933,321	(unchanged)

(a) Telephone Expenses

Total	$6,190,719	(unchanged)
Reduction in Allowance for Depreciation and Amortization	357,409	
Total Telephone Expenses (Revised)	$5,833,310	
Net Telephone Revenues	$1,100,011	
Per cent. Net Revenues	4.88%	

(b) Telephone Expenses

Total	$6,190,719	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	173,647	
Total Telephone Expenses (Revised)	$6,017,072	
Net Telephone Revenues	$916,249	
Per cent. Net Revenues	4.07%	

(c) Telephone Expenses

Total	$6,190,719	(unchanged)
Reduction in Allowance for Deprec. & Amort. and Licensee Con. Exps.	531,056	
Total Telephone Expenses (Revised)	$5,659,663	
Net Telephone Revenues	$1,273,658	
Per cent. Net Revenues	5.66%	

[fol. 265] State of Washington

1922

Average Cost of Property

Total	$27,152,722	(unchanged)

Telephone Revenues

Total	$7,376,120	(unchanged)

(a) Telephone Expenses

Total	$6,514,553	(unchanged)
Reduction in Allowance for Depreciation & Amortization	347,536	
Total Telephone Expenses (Revised)	$6,167,017	
Net telephone revenues	$1,209,103	
Per cent. Net Revenues	4.45%	

(b) Telephone Expenses

Total	$6,514,553	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	184,445	
Total Telephone Expenses (Revised)	$6,330,108	
Net Telephone Revenues	$1,046,012	
Per Cent. Net Revenues	3.85%	

(c) Telephone Expenses

Total	$6,514,553	(unchanged)
Reduction in Allowance for Deprec. & Amort. and Licensee Con. Exps.	531,981	
Total Telephone Expenses (Revised)	$5,982,572	
Net Telephone Revenues	1,393,548	
Per cent. Net Revenues	5.13%	

[fol. 266] The controversial matters are the two items of expense, (1) depreciation, (2) compensation to the American Telephone and Telegraph Company under the licensee contract. Defendants have reduced the annual depreciation charge for a period of two years to three and one-half per centum and have fixed the compensation under the said contract at ninety cents per station instead of four and one-half per centum of the gross operating revenue. Such action is not capricious or confiscatory but is fully warranted by the facts.

Further than this deponent saith not, save that this affidavit is made in support of a motion to dissolve the temporary restraining order heretofore issued herein.

E. V. Kuykendall.

Subscribed and sworn to before me this twenty-eighth day of April, 1923. J. H. Brown, Notary Public in and for the State of Washington, Residing at Olympia.

[File endorsement omitted.]

[fol. 267] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

MOTION TO STAY

Come now the defendants still relying upon their motion to dissolve the temporary restraining order, and denying the application for an interlocutory injunction, and move the court for a stay in the above entitled action pending the final determination of a suit which has been instituted in the superior court of the state of Washington for Thurston county, having jurisdiction thereof under the laws of the state, to enforce the order enjoined in the above entitled case, which suit is accompanied by a stay in such state court of the proceedings under such order pending the determination of such suit by such state court.

This motion is based on the files and records in the above entitled case, and upon the affidavit of E. V. Kuykendall, hereto attached.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants. T. J. L. Kennedy, P. C. Sullivan, Alex Winston, James M. Geraghty, Of Counsel.

[fol. 268] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF E. V. KUYKENDALL—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of Thurston, ss:

E. V. Kuykendall, being first duly sworn, on oath deposes and says: That he is the duly appointed, qualified and acting Director of Public Works of the State of Washington, and one of the defendants in the above entitled action; that an action has been instituted in the superior court of the state of Washington for Thurston county and served upon him, the pleadings in such action being in words and figures as follows: to-wit:

[fol. 269] EXHIBIT TO KUYKENDALL'S AFFIDAVIT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 8972

THE STATE OF WASHINGTON ex Rel. THE CITY OF SEATTLE, a Municipal Corporation, Petitioner and Relator,

v.

E. V. KUYKENDALL, as Director of Public Works; HANCE H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the Persons Constituting That Portion of the Department of Public Works of Washington Exercising Jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," and The Pacific Telephone and Telegraph Company, a Corporation, Respondents

MOTION FOR WRIT OF REVIEW

Comes now the above named petitioner and relator and moves the court for an order for a writ of review directed to E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the division of Public Utilities under the "Public Service Commission Law," requiring and ordering them to certify to this court for review the records and proceedings in that certain proceeding before them, entitled: "The Department of Public Works of Washington, Complainant, v. The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company, [fol. 270] respondents—The City of Seattle, a municipal corporation, et al., complainants, v. The Pacific Telephone and Telegraph Company, a corporation, defendant, No. 5344, (Consolidated cases)."

This motion is based upon the petition and application for writ of review, filed herein, and the other records and files in the above entitled cause.

Thomas J. L. Kennedy, Corporation Counsel; Walter B. Beals, Assistant; George A. Meagher, Assistant, Attorneys for Petitioner and Relator.

[fol. 271] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

[Title omitted]

ORDERS FOR WRIT OF REVIEW

The court having read and examined the petition and application for writ of review heretofore filed in the above entitled cause by and on behalf of The City of Seattle, a municipal corporation, praying that a writ of review be issued forthwith directing E. V. Kuykendall, as Director of Public Works, Hence H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," to certify to this court for review the records and proceedings in that certain proceeding before them, entitled; "The Department of Public Works of [fol. 272] Washington, complainant, v. The Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company, respondents,—The City of Seattle, a municipal corporation, et al., complainants, v. The Pacific Telephone and Telegraph Company, a corporation, defendant, No. 5344, (Consolidated cases);" and it appearing to the court that said writ should issue; Now, Therefore, on motion of Thomas J. L. Kennedy, Corporation Counsel of the City of Seattle, and Walter B. Beals and George A. Meagher, Assistant Corporation Counsel of the City of Seattle, attorneys for the petitioner and relator, it is hereby

Ordered that a writ of review issue forthwith, directed to said E. V. Kuykendall, Hance H. Cleland and Frank R. Spinning, in their respective official capacities, requiring and directing that the record in said cause be certified to this court on or before the 23rd day of May, 1923, at the hour of 10:30 o'clock A. M.; It is further

Ordered that said writ be served by filing the same forthwith in the principal office of the Department of Public Works of Washington, at Olympia.

Done in open court this 27th day of April, 1923.

D. F. Wright, Judge.

[fol. 273] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

[Title omitted]

WRIT OF REVIEW

The State of Washington to E. V. Kuyendall, as Director of Public Works; Hance H. Cleland, as supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," and The Pacific Telephone and Telegraph Company, a corporation, respondents:

Whereas, The City of Seattle, a municipal corporation, has this day filed in the above entitled court its petition and application for a writ of review, supported by affidavit, from which it appears that the above named E. V. Kuykendall, Director of Public Works, and Frank H. Spinning, Supervisor of Transportation, being a majority of the persons constituting that portion of the Department of [fol. 274] Public Works of Washington charged with the enforcement of the "Public Service Commission Law," and, in the exercise of jurisdiction thereunder in the Division of Public Utilities, did, on the 31st day of March, 1923, make alleged findings of fact, render an opinion, and enter an order in the proceedings before the said Department of Public Works, in the Division of Public Utilities, entitled: "The Department of Public Works of Washington, complainant, v. The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company, respondents—The City of Seattle, a municipal corporation, et al., complainants, v. The Pacific Telephone and Telegraph Company, a corporation, respondent, No. 5344 (consolidated cases)," which said alleged findings of fact, opinion and order were served on The City of Seattle within thirty (30) days last past, to-wit, on the 2nd day of April, 1923.

And it further appearing that said order denied the prayer contained in the complaint and supplemental complaint of The City of Seattle for reduction in telephone rates, and that said order was based on certain incompetent testimony and disregarded competent testimony; and,

Whereas, it further appears that the complainant in said proceeding, The City of Seattle, deems the aforesaid order to be contrary to law and seeks the issuance of a writ of review for the purpose of having the reasonableness and lawfulness thereof inquired into and determined; and,

Whereas, it further appears that The City of Seattle has no right of appeal nor any other plain, speedy, adequate or other remedy at law or otherwise, and no remedy except a writ of review, and the court being fully advised in the premises; Now, Therefore, it is hereby

[fol. 275] Ordered that the said E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," certify their entire record in said cause entitled, "The Department of Public Works of Washington, complainant, v. The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company, respondents—The City of Seattle, a municipal corporation, et al., complainants, v. The Pacific Telephone and Telegraph Company, a corporation, respondent," numbered 5344 in their files, and file the same in this court, together with all evidence and all exhibits introduced before them in the hearings by them had in respect to said cause, together with all orders, docket entries and other entries in said cause by them made, and all things touching the said cause, as fully and entirely as it remains before you and the said Department of Public Works of Washington, Division of Public Utilities; And it is further

Ordered that this writ be, and it is hereby, made returnable on the 23rd day of May, 1923, (being a date less than thirty days from the date of issuance hereof), at the hour of 10:30 o'clock A. M., on or prior to which said date the aforesaid record shall be certified and filed herein; And it is further

Ordered that the said respondents, E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the [fol. 276] State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," and the Pacific Telephone and Telegraph Company, a corporation, appear before this court on said return date, at the said hour of 10:30 A. M., at which time a hearing will be had upon the reasonableness and lawfulness of the said order which was entered on the 31st day of March, 1923, as aforesaid, said hearing to be conducted as provided by law, and at said time this court may further cause to be done whatever it may appear of right ought to be done, and in the meantime that they, and each of them, and said Company desist from filing, or attempting to file, new or other or alternative telephone tariffs or schedules of telephone rates in the premises; And it is further

Ordered that this writ be served by filing the same in the principal office of the Department of Public Works of Washington at Olympia.

Herein fail not and have you then and there this writ.

Witness the Honorable D. F. Wright, Judge of the Superior Court of the State of Washington, for Thurston County, at Olympia, this 27th day of April, 1923.

D. F. Wright. Attest: Paul Paulk, County Clerk and ex-Officio Clerk of the Superior Court.

[fol. 277] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

[Title omitted]

APPLICATION AND PETITION FOR WRIT OF REVIEW

Comes now The City of Seattle, a municipal corporation, by its attorneys, Thomas J. L. Kennedy, Corporation Counsel, and Walter B. Beals and George A. Meagher, Assistant Corporation Counsel, deeming that certain order (hereinafter more fully described and referred to) of E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," (hereinafter referred to as Department of Public Works), to be contrary to law, and hereby applies to the court for a writ of review, directed [fol. 278] to the above named respondents, for the purpose of having the reasonableness and lawfulness of said order inquired into and determined. In support of its application, The City of Seattle shows the court:

I. That the petitioner and relator, The City of Seattle, is now, and at all times herein mentioned has been, a municipal corporation and city of the first class, organized and existing under and by virtue of the laws of the State of Washington.

II. That the respondent, The Pacific Telephone and Telegraph Company, is now, and at all times herein mentioned has been, a corporation and a "public service company" and "telephone company," owning, operating and managing certain telephone lines used in the conduct of the business of affording telephonic communication for hire within the State of Washington and within the city limits of the City of Seattle, pursuant to law and franchise grants from said City.

III. That Albert S. Burleson, at that time Postmaster General of the United States, was, on the 22nd day of July, 1918, designated by the President of the United States to supervise and direct the operation of certain telephone and telegraph lines temporarily taken in charge by the President of the United States pursuant to that certain joint resolution of the Congress of the United States, approved July [fol. 279] 16, 1918, authorizing the President of the United States to supervise, take possession and assume control of, telegraph, telephone and other systems of communication for the duration of the war with the Imperial Government of Germany.

IV. That heretofore, on the 5th day of August, 1916, the Public Service Commission of Washington, in Cause No. 1825 of its files, found, after hearing upon complaint, that certain telephone rates,

tolls and charges under the rules and regulations therein promulgated to govern the same, including certain provisions for discounts, were sufficiently remunerative to the above named respondent telephone company, the said findings as to rates, charges, rules and regulations and discounts being thereafter, on the 1st day of September, 1916, embodied in a tariff filed with the Public Service Commission of the State of Washington, a copy of said tariff, insofar as the same relates to The City of Seattle, being hereto attached, marked Exhibit "A", and by such reference made a part hereof.

V. That, on or about the 5th day of November, 1918, during the war period of "Federal wire control," certain officials of the above named respondent telephone company, pretending to act on behalf of the Federal Government, which was at that time in control of the entire plant and system of said telephone company and of all of its employees, issued, and thereafter filed with the Public Service Commission of Washington, a pretended new tariff and schedule of rates, attempting to supersede the tariff and rates hereinabove mentioned, and which was intended to become effective as of November [fol. 280] 15, 1918, without the thirty day notice to, or the permission of, the said Public Service Commission, and seeking and pretending to change and increase the tariff, rates and charges theretofore authorized by the Public Service Commission and changing the aforesaid rules and regulations and eliminating said discounts; that a copy of said pretended tariff is hereunto attached, Marked Exhibit "B" and by such reference made a part hereof; that said pretended tariff, insofar as the same attempted to change said rules and regulations and to eliminate said discounts, and insofar as it attempted to provide for increased rates and charges, was unjust, unfair and unreasonable, and contrary to, and not authorized by, law.

VI. That, the entire plant and system of the respondent telephone company being at that time subject to, and under, Federal war time control, the Public Service Commission of Washington was without any jurisdiction in the premises and was without authority or jurisdiction to receive or file said tariff or to make any order in respect to the same, and said pretended tariff and schedule of rates was therefore without legal effect or standing in law; that the said Public Service Commission nevertheless attempted to assume jurisdiction and to hold a hearing in respect to the same in Cause No. 4747 of its files, and attempted, after said hearing, to approve, and made an order approving, said tariff; that said order approving said tariff was set aside by the Supreme Court of the State of Washington as not within the jurisdiction of the Public Service Commission during Federal wire control; that said decision of the Supreme Court is reported in [fol. 281] Volume 110 of the Washington Reports, at page 130; that the said order of the Public Service Commission and the said tariff were, and are, ineffective for any purpose; that the Federal wire control was terminated on or about August 1, 1919, and the said plant and system of the said respondent returned to it by the Federal Government; that the said respondent thereafter filed no new

tariff (and has not to this day filed any new tariff in the premises with the exception of a disapproved tariff hereinafter referred to), but continued to charge, and still continues to charge, its patrons in Seattle the rates prescribed in said pretended tariff herein set forth as Exhibit "B", although the only lawful tariff on file on behalf of said respondent in respect to the City of Seattle is the tariff herein set forth as Exhibit "A".

VII. That the rates, tolls, contracts, charges and rules and regulations imposed upon telephone users within the City of Seattle under said pretended tariff (Exhibit "B") are unjust, unfair, unreasonable and more than sufficient and not authorized by any tariff on file with the State Department of Public Works or with its predecessor, the Public Service Commission of Washington; that, in so far as said rates, tolls and charges are in excess of the rates prescribed in the tariff herein set forth as Exhibit "A", the same are unlawful overcharges and excessive and exorbitant in amount and subject to be repaid to the telephone users, together with interest thereon from the date of collection thereof.

[fol. 282] VIII. That Ordinance No. 43170 is a valid and subsisting ordinance of the City of Seattle, entitled:

"An ordinace relating to, and providing for, the filing with the Department of Public Works of Washington of a complaint against the Pacific Telephone & Telegraph Company, and for the obtaining of evidence to sustain said complaint, and declaring an emergency,"

passed by the City Council on the 6th day of February, 1922, and approved by the Acting Mayor on the 7th day of February, 1922, and that, pursuant to authority thereby granted, a complaint was signed by the Acting Mayor, verified on oath, and filed by The City of Seattle with the Department of Public Works and given cause number 5344 in its files.

IX. That, on or about the 20th day of September, 1922, the above named respondent telephone company issued and filed with the above named Department of Public Works a new tariff and schedule of rates, entitled: "W. D. P. W. No. 3, The Pacific Telephone & Telegraph Company Exchange Rate Schedule," purporting to have been issued as of October 2, 1922, and to be effective November 1, 1922; that said tariff, having been specifically disapproved by said Department of Public Works, is no longer in issue and need not be herein further referred to.

X. That Ordinance No. 44257 is a valid and subsisting ordinance of The City of Seattle, entitled:

[fol. 283] "An ordinance relating to, and providing for, the filing with the Department of Public Works of Washington of a complaint against the Pacific Telephone and Telegraph Company, and for the obtaining of evidence to sustain said complaint, and declaring an emergency,"

passed by the City Council on the 16th day of October, 1922, and approved by the Mayor on the 17th day of October, 1922, and that, pursuant thereto, a supplemental complaint was signed by the Mayor, verified on oath, and filed with the Department of Public Works in said Cause No. 5344 of its files.

XI. That, prior to the filing of said complaint and supplemental complaint by The City of Seattle, the Department of Public Works, on its own motion, had filed, in its Cause No. 5344, its own complaint, entitled: "The Department of Public Works of Washington, complainant, v. The Pacific Telephone Company, respondents," complaining of the existing tariffs, rates, tolls, facilities and service of said telephone companies throughout the State of Washington, including The City of Seattle; that the complaint and supplemental complaint of The City of Seattle, hereinabove referred to, were consolidated in the same cause with the said complaint of the Department of Public Works, and that on the 18th day of December, 1922, and dates subsequent thereto, the said Department of Public Works proceeded to hear and take evidence and testimony in respect to said complaints and supplemental complaint, combining the hearing thereof with sundry other complaints, the consolidated hearing being, and in, said Cause No. 5344 of the files of said Department of Public Works, entitled, "The Department of Public Works of Washing-[fol. 284] ton, complainant v. The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company, respondents, — The City of Seattle, a municipal corporation, et al., complainants, v. The Pacific Telephone and Telegraph Company, a corporation, etc., etc, defendants;" that, over the objection of petitioner and relator, the said Department of Public Works received incompetent evidence and considered the same in support of its finding, later made, in respect to the rates and tariffs provided for in said Exhibit "B."

XII. That thereafter, on the 31st day of March, 1923, the said Department of Public Works made and entered its pretended findings of fact, opinion, and final order in said consolidated cases, wherein and whereby said Department of Public Works pretended to order the dismissal of petitioner's complaint and supplemental complaint, in so far as the same sought a reduction in the rates specified in said Exhibit "B," and whereby said Department of Public Works further pretended to find the rates specified in said Exhibit "B" to be just, fair reasonable and not more than sufficient, and to order that said respondent telephone company be authorized to charge the rates specified in said Exhibit "B"; that said findings, opinion and order were served upon petitioner and relator on the 2nd day of April, 1923.

XIII. That said order of said Department of Public Works, in the respects hereinabove specified, is contrary to law, unreasonable and [fol. 285] unlawful, and made without jurisdiction, without the support of any competent evidence, and on the basis of incompetent evidence; that the authority conferred upon said Department of Public Works, in relation to the subject matter, was not pursued in the

mode required by law in order to authorize it to make the determination herein sought to be reviewed; that, in making the determination herein sought to be reviewed, all rules of law affecting the rights of the parties were violated, to the prejudice of the petitioner and relator; that there was no competent proof of any of the facts necessary to be proved in order to authorize the said Department of Public Works to make the determination herein sought to be reviewed; that upon all the evidence there was such a preponderance of proof against the existence of the alleged facts found as the basis for the denying of a reduction in rates, such as would, in an action in court, triable by a jury, authorize the setting of the same aside by the court as against the weight of the evidence; that there was included in the "rate base" upon which the respondent telephone company was held to be entitled to a fair return, millions of dollars of "construction work in progress" not yet used or useful for the public, and thousands of dollars listed as "Due from Subscribers and Agents;" that there was not deducted from said "rate base," but should have been so deducted, hundreds of thousands of dollars of excess funds collected and carried by said telephone company in a depreciation reserve over and above the amounts necessary to cover accrued depreciation; that there was included in said "rate base" millions of dollars of "ma-
[fol. 286] chine switching" facilities installed in the City of Seattle which added nothing to the service of present subscribers and which was, and is, an injudicious and improvident investment upon which the company is not entitled to a return, fair or otherwise; that, in making its determination, the Department of Public Works considered and gave weight to a "material supply contract" with the so-called Western Electric Company (which is an "associate" or "affiliated" company of the said telephone company, having common or interlocking directorates), which said contract is unlawful at common law and by reason of Federal statutes, and that in making its final determination of the amounts to which the said telephone company was entitled as operating expenses, the said Department of Public Works assumed that the extravagant expenses of said telephone company represented fair expenditures for said purposes.

XIV. That the order so made by said Department of Public Works was, and is, unlawful and unreasonable and contrary to law and without foundation and against the weight of the evidence adduced at the hearing in support of a reduction of rates; that the City of Seattle has no right of appeal nor any plain, speedy and adequate or other remedy at law and has no remedy except a writ of review; that the petitioner and relator, desiring to have the reasonableness and lawfulness of said order inquired into and determined, makes this application for a writ of review under the provisions of the Public Service Commission Law of Washington.

[fol. 287] Wherefore, petitioner and relator, The City of Seattle, prays:

That, inasmuch as the several objections urged in this petition were made before the Department of Public Works in said Cause

No. 5344 in the course of the hearing thereof, and inasmuch as the matters and things herein set forth will appear more fully in the records and files of said Cause No. 5344 in the office of said Department of Public Works, therefore this court issue its writ of review, requiring and commanding said Department of Public Works to certify to this court the records in said proceeding, including the complaint and supplemental complaint of The City of Seattle, and record of all of the testimony taken at the aforesaid hearings, and the finding and order of said Department of Public Works, made and filed on the 31st day of March, 1923, together with all exhibits of every kind and nature offered and received in connection with said hearings, and each and every order made and entered in connection therewith, and that, upon said record being returned into this court, the court grant a full review and hearing of said findings and orders and of all of said proceedings, and that the manifest errors herein complained of be corrected, and that said findings and orders, which are contrary to law and unreasonable, as aforesaid, be in all things set aside and annulled, in so far as the same deny a reduction in telephone rates within The City of Seattle, and that petitioner and relator be granted such further relief as in justice and law it may be entitled to.

[fol. 288] The City of Seattle, a Municipal Corporation, By Edwin J. Brown, Its Mayor. Thomas J. L. Kennedy, Corporation Counsel; Walter B. Beals, Assistant; George A. Meagher, Assistant, Attorneys for Petitioner and Relator.

[fol. 289] Jurat showing the foregoing was duly sworn to by Edwin J. Brown omitted in printing.

[fol. 290] EXHIBIT A TO APPLICATION

W. P. S. C. No. 2, Section 1

The Pacific Telephone & Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King Co., Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$7.50	$7.50
Auxiliary Line	6.00	6.00
" " (Inward Service)	3.00	3.00
Suburban Service (Ten Party line, see Sec. 2)	3.00	3.00
Extension (with or without bell)	1.00	1.00

Residence—Unlimited Service

Individual Line	3.00	3.50
Two-party Line	2.50	3.00
*Four-party Line	2.25	2.75
Extension (without bell)	.50	.50
" (With bell)	.50	.50
Suburban Service (Ten party line, see Sec. 2)	2.50	2.50

Primary Rate Area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

*Discount of 25¢ if bill is paid at office on or before the tenth day of month.

Issued September 1, 1916. Effective September 1, 1916.

Cancels and supersedes Exchange Rate Schedule effective January 1, 1911.

*In accordance with Order No. 1825 of the Public Service Commission of Washington.

P. H. Coolidge, General Commercial Superintendent.

[fol. 291] Exhibit "A" (Continued)

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King Co., Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.00	$5.00	100	$.03
" "	6.00	6.00	150	.025
Auxiliary Line	2.50	2.50		
Auxiliary Line	2.50	2.50	...	....
Extension (with or without bell)	.75	.75	...	....

Residence—Measured Service

Business—Coin Box Service

Individual Line	.15	.15	3	.035
Extension (with or without bell)	1.00	1.00	...	....

Residence—Coin Box Service

Issued September 1, 1916. Effective September 1, 1916.
Cancels and supersedes Exchange Rate Schedule effective January 1, 1911.
* In accordance with Order 1825 of the Public Service Commission of Washington.
P. H. Coolidge, General Commercial Superintendent.

[fol. 292] EXHIBIT "B" TO APPLICATION

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King Co., Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Extension (with or without bell)	1.00	1.00
Suburban Service (Ten party line, see Section 3)	3.50	3.75

Residence—Unlimited Service

Individual Line,	3.75	4.00
Two Party Line,	3.00	3.25
Four Party Line,	2.50	2.75
Extension (without bell)	.50	.75
Extension (with bell)	.65	1.00
Suburban Service (Ten party line, see Section 3)	3.00	3.25

Primary Rate Area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.
Issued November 5th, 1918. Effective Nov. 1, 1918.
Cancels and supersedes Exchange Rate Schedule effective September 1st, 1916.
P. H. Coolidge, General Commercial Superintendent.

[fol. 293] Exhibit "B" (Continued)

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King Co., Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line, ...	$6.50	$6.75	$1.30	$.04
Auxiliary Line.....	2.50	2.75	...	....
Extension (with or without bell)	.75	.75	...	....

Business—Coin Box Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$.15	$ *	$.03	$.05
*25 cents per month additional.				
Extension (with or without bell) per month.....	1.00	1.00	....	....

Issued November 5th, 1918. Effective November 15, 1918.
Cancels and supersedes Exchange Rate Schedule Effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

STATE OF WASHINGTON,
County of Thurston, ss:

I, Paul Paulk, Depty. County Clerk of Thurston County and Ex-officio Clerk of the Superior Court of the State of Washington, for Thurston County, holding session at Olympia, do hereby certify that the foregoing is a true and correct copy of the original Motion for Writ of Review, Order for Writ of Review, Writ of Review and Application for Writ of Review, Cause #8972, State ex rel. City of Seattle vs. E. V. Kuykendall, et al. as the same appears on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 27th day of April, 1923.

Paul Paulk, Deputy County Clerk and Clerk of the Superior Court of Thurston County, State of Washington.

[fol. 294] and made a part of this affidavit.

E. V. Kuykendall.

Subscribed and sworn to before me this 25th day of April, 1923. J. H. Brown, Notary Public in and for the State of Washington, Residing at Olympia.

[File endorsement omitted.]

[fol. 295] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF E. D. RIDLEY CONCERNING RATE BASE AND FAIR RETURN OF PLAINTIFF—Filed Apr. 30, 1923

THE STATE OF WASHINGTON,
County of King, ss:

E. D. Ridley, being first duly sworn, upon oath deposes and says: That affiant is an engineering accountant, of ten years' experience in such work; that affiant served in such capacity and in that of law assistant with the Public Service Commission of Washington for a period of six years; that for some time past, affiant has been associated with Thomas E. Phipps, consulting valuation engineer; that affiant was employed by said Thomas E. Phipps and by the City of Spokane in connection with a plant survey and valuation of the properties of the Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company in connection with Cause No. 5344 of the Department of Public Works of Washing-
[fol. 296] ton, in which the order in this cause complained of was entered by said Department; that, in arriving at the rate base of $32,108,853.76 for the purpose of fixing a rate of fair return for the plaintiff telephone companies, the Department of Public Works included $6,712,822 of construction work in progress and $335,964 representing amounts due from subscribers and agents, although both of said amounts might reasonably as a matter of law have been deducted from the rate base as fixed by said Department; that, in making this affidavit, affiant is not basing his opinion on the further contention that might be made that the machine switching program in the City of Seattle, representing practically the total amount of construction work in progress above mentioned, could reasonably have been deducted from the rate base by the Department on the theory that, under the Company's evidence, the same was an injudicious investment; that, allocating to the State of Washington its proportion of the accrued depreciation reserve of The Pacific Telephone and Telegraph Company, a figure of $5,613,816 is arrived at; that, deducting the 15% accrued depreciation found by the Department of Public Works in the amount of $3,073,265, the excess amount for the State of Washington in the depreciation reserve of said Pacific Company amounts to $2,540,551; that in

fixing the rate base above mentioned, the Department of Public Works did not deduct this, or any other, amount as representing excessive accrued depreciation reserve; that if the above or any of the foregoing deductions had been made by the State Department of Public Works, the fair return to the company, as indicated in the opinion and order of the Department, would necessarily have been much higher and in excess of the 6.01% by said Department found [fol. 297] to be a fair return which would accrue to the Company under its present rates.

E. D Ridley

Subscribed and sworn to before me this 28th day of April, 1923. E. B. McClinton, Notary Public in and for the State of Washington, Residing at Seattle.

[File endorsement omitted.]

[fol. 298] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

ORDER DISSOLVING RESTRAINING ORDER AND DENYING INJUNCTION—Filed Apr. 30, 1923

This matter coming on for hearing before Hon. William B. Gilbert, Circuit Judge, and Hon. Edward E. Cushman and Hon. Jeremiah Neterer, District Judges, upon plaintiffs' application for an interlocutory injunction and the defendants' motion to dissolve the restraining order heretofore issued,

It is ordered that the restraining order be dissolved and that an interlocutory injunction be denied.

Opinion will be later filed.

Ordered, this 30th day of April, A. D. 1923.

William B. Gilbert, Circuit Judge. Edward E. Cushman, District Judge. Jeremiah Neterer, District Judge.

[fol. 299] [File endorsement omitted.]

[fol. 300] IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

[fol. 301] OPINION ON APPLICATION FOR AN INTERLOCUTORY INJUNCTION—Filed May 23, 1923

Before Hon. William B. Gilbert, United States Circuit Judge, Hon. Edward E. Cushman and Hon. Jeremiah Neterer, United States District Judges

These causes are before the court upon applications for temporary injunctions under Section 266 of the Judicial Code (Section 1243 Compiled Statutes) and also upon defendants' motions to dissolve the restraining orders heretofore made.

The Complaint in cause No. 166-E alleges that plaintiff operates a telephone and telegraph system in the State of Washington and elsewhere; that the defendants are officers of the State of Washington, as recited in the title hereto; that the order of the Department of Public Works of the State, prescribing maximum rates to be charged by plaintiff for its telephone service, is confiscatory and would deprive plaintiff of its property without due process of law; that, in September, 1922, plaintiff filed a schedule of rates, increasing its charges, which was suspended by the Department and an order made that plaintiff withdraw such schedule of rates filed and file a schedule conforming to its schedule in effect prior to the war period, which plaintiff did, save as to charges applicable to the Cities of Seattle and Tacoma; that numerous hearings were had by the Department for the purpose of determining the value of plaintiff's [fol. 302] property and the reasonableness of its rates; that a ruling of the Department was made, one member dissenting, denying plaintiff's application for an increase in all respects. The dissenting member found the rates fixed, both toll and exchange, unreasonably low and found the rates filed by plaintiff in compliance with defendants' order to be reasonable.

It is averred that the cost of plaintiff's property in the state—exclusive of that furnishing telephone service to Spokane and adjacent territory (which latter is the subject of suit No. 167-E), was, on December 31, 1922, $29,347,254.00; that the cost of its Seattle property was $17,023,372.00; and the cost of its Tacoma property, $2,888,021.00; that the cost of such property has been increased since such date by additions and betterments; that the cost to plaintiff of its property was taken by the Department, substantially, as the rate base in fixing its charges in the order attacked; that the cost of reproduction as of the above date was, for the state, not including Spokane, $48,087,785.00; for Seattle $27,149,130.00 and for Tacoma $4,998,964.00; that the cost, less depreciation of such date, for the state was $24,919,930.00; and for Tacoma $4,534,264.00; that the fair and reasonable value of such property as of such date was: for

the State, $35,616,896.00; for Seattle, $20,852,067.00; and for Tacoma $3,457,290.00.

The complaint further alleges that:

"The foregoing statements as to the cost to plaintiff of said respective properties include nothing on account of the item of franchises, or the item known as going concern value, but said latter item has been considered in determing the present cost of reproduction and the present fair and reasonable value of said property."

Not less than eight per cent upon the reasonable value is alleged to be a fair annual rate upon its business.

It is alleged that plaintiff's net return upon such property under the rates ordered for the years 1919, 1920, 1921, and 1922, based upon [fol. 303] property cost, has ranged, for the state, from a maximum, in 1919, of 4.97% to a minimum in 1922, of 3.17%; for Seattle, from a maximum, in 1919, of 3.97%, to a minimum, in 1922, of .19%; and for Tacoma, from a maximum in 1919 of .98% to a minimum in 1921 of .58%. That its rate of return during such years, based upon the fair value of its property ranged, for the state, from a maximum in 1919, of 3.67% to a minimum in 1921 and 1922, of 2.58%; for Seattle, from a maximum in 1919, of 2.66% to a minmum, in 1922, of .15%; and for Tacoma from a maximum of .81% in 1919, to a minimum, in 1921 of .48%. That the net revenue received for such years fell short of eight per cent upon the cost of its property in varying amounts, ranging for the state from a maximum in 1922, of $1,310,651.00 to a minimum in 1919 of $537,242.00; for Seattle, from a maximum in 1922 of $1,192,580 to a minimum, in 1919, of $312,793.00; and for Tacoma, from a maximum in 1921, of $205,110.00 to a minimum in 1919 of $187,587.00.

It is further alleged that, if the rates ordered are enforced and efficient service is maintained, it will result in the confiscation of plaintiff's property and prevent it from earning any return upon the fair and reasonable value of its property in the State in excess of 2.11% per annum; that .54% per annum loss would result upon the value of its Seattle property and .56% upon its Tacoma property.

It is alleged that, were the rates of the dissenting order in effect for 1923, plaintiff's return upon the fair and reasonable value of its property in the state would be 5.09%; for the City of Seattle, 2.81% and for Tacoma, 3.96%; that based upon the cost of its property, for [fol. 304] the same period, plaintiff's rate would be, for the state, 6.15%; for the City of Seattle, 3.42%; and for the City of Tacoma, 4.73%; that such last mentioned rates are unreasonably low; but that plaintiff proposes to put them in effect pending final decree and asks relief by way of an interlocutory injunction enabling it so to do.

In the above entitled cause, No. 167-E, involving the Spokane rates, alone, the complaint asks the same relief and, in so far as its allegations differ from the foregoing avers:

That the cost of the property in the Spokane exchange (land being included at present value), was, on the 31st day of December, 1922, $4,266,899.00; that the cost at present is in excess of this amount; that the cost above given is the rate base used by the De-

partment in the order attacked; that the cost of reproduction as of December 31, 1922, would be $8,039,784.00; that the cost of reproduction, less depreciation, as of that date, would be $7,382,484.00; that the fair and reasonable value of the Spokane exchange property is $5,710,684.00. That plaintiff's net earnings for the years 1919, 1920, 1921 and 1922, calculated upon the cost of the property, give plaintiff an annual return ranging, from a maximum, in 1922, of 3.07%, to a minimum, in 1920, of 1.79%; that its net earnings for the same years, calculated on the fair value of its property, give returns ranging from a maximum, in 1922, of 2.28%, to a minimum in 1920 of 1.30%. That for such years the net revenue failed to make a return of eight per cent. upon the cost, in amounts ranging from a minimum, in 1919, of $193,042.00, to a maximum in 1920, of $237,883.00. That, if the Department's order is enforced, plaintiff would be prevented from earning, in 1923, any return in excess [fol. 305] of 1.88% per annum upon the fair and reasonable value of its property. That, if the order of the dissenting member of the Department—which plaintiff asks to have put in effect pending final decree—is enforced, plaintiff would earn, for such time, 5.52% upon the fair value of its property, which would amount to but 7.64% upon its cost.

It is shown herein that the proceedings before the Department, resulting in the rate order attacked by the complaint, were instituted upon the complaint of the Department, after which the City of Seattle filed its supplemental complaint therein attacking plaintiff's then existing rates.

The Department held:

"that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the state of Washington * * *.

"The Department's engineering and accounting staff was forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department."

The causes were consolidated for hearing by the Department. On December 14, 1922, the Washington Hotel Men's Association filed its complaint. Representatives of the cities of Tacoma and Spokane took part in the hearing. These hearings resulted in the Department's order attacked herein by plaintiffs.

At the conclusion of a number of hearings, the Department found:

"Finding

The value of the telephone properties of the Pacific Telephone and [fol. 306] Telegraph Company in the state of Washington, including the Spokane Exchange, used and useful in public service, was

as of June 30, 1922, $32,108,853.76 which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company vs. Kuykendall, 119 Wash. 107.

* * * * * * *

"As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

"In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph 'system'. Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific System just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of the state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma. * * *

"Finding

We find that the annual depreciation charge should be reduced from approximately 6% to 3½% for the period of two years from April 1st, 1923. * * *

"Finding

We find that the Four and One-half per cent. contract between the Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company is wrong in principle, contrary to public policy and the compensation thereunder should be computed on the per station basis rather than a perecentage of revenue. We find a reasonable charge per annum for the services rendered under said contract to be 90 cents per station. * * *

"In the case of the City of Houston vs. Southwestern Bell Telephone Company etc., U. S. Supreme Court Advance Opinions 1921-1922, No. 16, July 1, 1922, p. 539, is cited by respondents as supporting the contract, but the opinion clearly states that the fact that one [fol. 307] company owns stock in another 'requires close scrutiny of

their dealings to prevent imposition upon the community served by the company.' "

In cause No. 166-E, the Attorney General has moved for a stay of this suit, pending the final determination of a suit brought in the Superior Court of Thurston County, ex rel. City of Seattle, on the ground that the latter suit is one to enforce the order sought to be enjoined herein.

Section 266 of the Judicial Code (Section 1243 Comp. Stats.), in part, provides:

" * * * It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith."

An examination of the record in the suit in Thurston County on the relation of the City of Seattle shows that this suit is one also attacking the rate ordered by the Department, and asks an even lower rate than that provided by the order for Seattle. It is shown that an order has been made by the Superior Court in such suit, in part, as follows:

"Ordered that the said respondents, E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the 'Public Service Commission Law,' and The Pacific Telephone and Telegraph Company, a corporation, appear before this court on said return date, at the said hour of 10:30 A. M., at which time a hearing will be had upon the reasonableness and lawfulness of the said order which was entered on the 31st day of March, 1923, as aforesaid, said hearing to be conducted as provided by law, and at said time this court may [fol. 308] further cause to be done whatever it may appear of right ought to be done, and in the meantime that they, and each of them, and said Company desist from filing or attempting to file, new or other or alternative telephone tariffs and schedules of telephone rates in the premises."

The rates to be established for the state must be, to a certain extent at least, inter-dependent. Yet it would seem that the suit in the Superior Court, being brought on relation of the City of Seattle,

would not, in the absence of intervention, necessarily be res judicata either of the rates throughout the state, or those of Tacoma or Spokane. Yet it is clear that the Department's course in holding that the questions involved would only be satisfactorily determined after "an investigation and study of the entire system of the Pacific Telephone & Telegraph Company in the State of Washington" was entirely proper. This system and the rate to be fixed, based upon its ascertained value, are in the nature of a res. Therefore, while questions determined in the absence of interested parties, if any, may not strictly be res judicata, yet under the necessities of the case, all the rights and duties of all interested would necessarily be considered and found, if not determined.

The foregoing considerations, coupled with the fact that the suit brought in the Superior Court is not one to enforce the rate order attacked by plaintiffs, but, is itself, one making an attack thereon, renders the proviso of Section 266 of the Judicial Code not strictly applicable. It does not follow, however, that consideration of the institution of such suit is to be ignored, or that it is without effect. This matter will be later considered.

By sections 10424 and 10431, Remington's Compiled Statutes, 1922, it is provided:

[fol. 309] "Sec. 10424. Whenever any public service company shall file with the commission any schedule, classification, rule or regulation, the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed increase and the reasonableness and justice thereof, and pending such hearing and the decision thereon, the commission may suspend the operation of such rate, fare, charge, rental or toll for a period of ninety (90) days from the time the same would otherwise go into effect, and after a full hearing the commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective: Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding sixty (60) days.

"At any hearing involving any change in any schedule, classification, rule or regulation the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the burden of proof to show that the changed schedule, classification, rule, or regulation, or the increased or proposed increased rate, fare, charge, rental or toll, is just and reasonable shall be upon the public service company.

"The commission shall give to the hearing and decision of such questions preference over all other questions pending before it and shall decide the same as speedily as possible.

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such

action by the superior court, or, if appealed to the supreme court, by such supreme court." (Laws of 1915, p. 362, sec. 1. Cf. Laws of 1911, p. 594, sec. 82.)

"Sec. 10431. Any public service company affected by any order of the commission, and deeming itself aggrieved, may, after the expiration of two years from the date of such order taking effect, petition the commission for a rehearing upon the matters involved in such order, setting forth in such petition the grounds and reasons for such rehearing, which grounds and reasons may comprise and consist of changed conditions since the issuance of such order, or by showing a result injuriously affecting the petitioner which was not considered or anticipated at the former hearing, or that the effect of such order has been such as was not contemplated by the commission or the petitioner, or for any good and sufficient cause which for any reason was not considered and determined in such former hearing. Upon the filing of such petition, such proceedings shall be had thereon as are provided for hearings upon complaint, and such orders may be reviewed as are other orders of the commission: Provided, that no order superseding the order of the commission [fol. 310] denying such rehearing shall be granted by the court pending the review. In case any order of the commission shall not be reviewed, but shall be complied with by the public service company, such petition for rehearing may be filed within six months from and after the date of the taking effect of such order, and the proceedings thereon shall be as in this section provided. The commission may, in its discretion, permit the filing of a petition for rehearing at any time. No order of the commission upon a rehearing shall affect any right of action or penalty accruing under the original order unless so ordered by the commission." (Laws of 1911, p. 599, sec. 89.)

It has been contended upon the part of the defendants that the present suit has been prematurely begun because no petition for a re-hearing has been presented by plaintiffs to the Department of Public Works—which is the successor of the Public Service Commission (Remington's Compiled Statutes section 10784)—asking for a re-consideration of its rate order.

In view of the discretionary character of proceedings upon rehearing and the provision made in the sections quoted denying the right of supersedeas—which latter, while expressly only made applicable to the court's review of the Department's order, it may be assumed, would, in its discretion, be adopted by the Department—it is concluded that the suits have not been prematurely begun upon this ground.

William A. Prendergast, et al. vs. New York Telephone Company (Decided by U. S. Sup. Ct. Apr. 16, 1923).

It was stated upon the argument of the application for a preliminary injunction that, after service of the restraining order, plaintiffs had filed the schedule of rates directed in the order, being those asked pending final determination of the suit. Defendants contend

that this constituted an abandonment by plaintiffs of the rate schedules involved in the Department's hearings and findings. The court [fol. 311] concludes that such filing was but a step taken by plaintiffs in rendering affective the restraining order and that its result was not to render the issues involved in these suits merely moot questions.

It has been further suggested that these suits have been prematurely begun because plaintiffs did not, prior to their institution, seek a review of the Department's order by the State court. Sections 10428 and 10429 Remington's Compiled Statutes provide:

"Sec. 10428. Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action." (Laws of 1911, p. 396, sec. 86.)

It will be noted from the foregoing section that, upon review, the court may only render judgment either affirming or setting aside the order of the Commission, unless the court should hold that the language of this section:

"The court may, in its discretion, remand any cause which is reversed by it to the commission for further action."

[fol. 312] gives the court a wider discretion. Unless it is so held, the court is given no power by that section to make its own findings, or fix rates. For this reason, as far as this statute is concerned, the suit has not been begun prematurely. (Bacon v. Rutland R. R. Co., 232 U. S. 134, at 137.)

The plaintiff, The Pacific Telephone and Telegraph Company (Cause No. 166-E), in describing the hearings had by the Department resulting in its order attacked herein alleges:

"That subsequent to the dates hereinbefore mentioned and between December 18, 1922, and March 1, 1923, said Department held numerous hearings in the State of Washington for the purpose of determining the value of plaintiff's property used or useful in rendering telephone service in the State of Washington; the reasonableness or unreasonableness of the rates and charges then being charged by plaintiff in said state; the reasonableness or unreasonableness of the schedule of rates and charges applicable to the toll service filed as aforesaid by plaintiff on October 5, 1922; and the reasonableness or unreasonableness of the schedule of exchange rates applicable to Seattle and Tacoma filed as aforesaid on September 20, 1922. * * * That the cost to plaintiff of its property in the State of Washington, in the City of Seattle and in the City of Tacoma is now somewhat in excess of the amounts hereinbefore mentioned on account of the additions and betterments in the meantime made to said respective properties. That the cost to plaintiff of its property in the State of Washington and in the cities of Seattle and Tacoma is substantially the rate base fixed by the Department of Public Works in its said order of March 31, 1923, as of the 30th day of June, 1922, with additions and betterments thereto made since that time."

Similar allegations are contained in the complaint in cause No. 167-E.

The outline above of the complaints in the two suits shows that there is involved a controversy as to the value of the properties; that is, the determination of the rate base.

Section 10441 Remington's Compiled Statutes (which is described in one of its titles as appearing in the 1913 session laws of the state: "Valuation of Public Service Properties as Fixed for Rate Purposes not to be Used for Taxing Purposes") provides:

[fol. 313] "The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition the property of every public service company. * * *

"The commission is hereby authorized to cause a hearing or hearings to be held at such time or times and place or places as the commission may designate for the purpose of ascertaining the matters and things provided for in this section.

"The commission shall, before any hearing is had, notify the company concerned of the time and place of such hearing, by giving at least thirty days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such company's property within the state, which shall be a sufficient complaint to authorize the commission to inquire into the matters designated in this section.

"All companies affected shall be entitled to be heard and intro-

duce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission.

"The commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it shall tend to show the value of the property used by such company for the public convenience.

"Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted or unjust, may institute proceedings in the superior court of the state of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined. Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of [Vol. 314] the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

"Said public service company or the commission shall have the right to appeal from the decision of the superior court to the supreme court of the state of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received.

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and valuation, in which the state or any officer, department or institution thereof, or any county, municipality or other body politic and the public service company affected is interested, whether arising under the provisions of this act or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such

findings as of the date therein stated under conditions then existing, except as a basis for taxation, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined.

"The commission shall hereafter, from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions, and extensions made by any public service company to its property subsequent to the date of any prior hearing, and shall examine into all traffic movement and every matter and thing that would change, modify, or affect any finding of fact previously made, and shall at such time make findings of fact supplemental to those theretofore made, showing the amount expended in betterments, improvements, extensions and additions since such prior findings and the cost of reproducing the same, the value of the property used by such company at the time of such subsequent hearing, the relative value of the use to which such property is put in the performance of intrastate and interstate business, respectively, and the value of the property of such company in the state used for the public convenience of intrastate business. Such hearing shall be had upon the same notice, the examination conducted in the same manner, and the findings so [fol. 315] made shall have the same force and effect as is provided herein for such original notice, hearing and findings: Provided, that such findings made at such supplemental hearing shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing." (Laws of 1911, p. 601, sec. 92; Laws of 1913, p. 662, sec. 1.)

Section 10429 Remington's Compiled Statutes provides:

"The pendency of any writ of review shall not of itself stay or suspend the operation of the order of the commission, but the superior court in its discretion may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

"No order so restraining or suspending an order of the commission relating to rates, fares, charges, tolls or rentals, or rules or regulations, practices, classifications or contracts affecting the same, shall be made by the superior court otherwise than upon three days' notice and after hearing, and if a supersedeas is granted the order granting the same shall contain a specific finding, based upon evidence submitted to the court making the order, and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage; Provided, however, that when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed in any case from such order pending the final determination of the cause

in the superior court, or if appealed to the supreme court by such supreme court.

"In case the order of the commission under review is superseded by the court, it shall require a bond, with good and sufficient surety, conditioned that such company petitioning for such review shall answer for all damages caused by the delay in the enforcement of the order of the commission, and all compensation for whatever sums for transportation, transmission or service any person or corporation shall be compelled to pay pending the review proceedings in excess of the sum such person or corporation would have been compelled to pay if the order of the commission had not been suspended.

"The court may, in addition to or in lieu of the bond herein provided for, require such other or further security for the payment of such excess charges or damages as it may deem proper." (Laws of 1911, p. 597, sec. 87.)

[fol. 316] The findings of the Department show that its hearings and findings were made in pursuance of section 10441 above.

It clearly appears from the foregoing that, upon a review of the Department's proceedings, neither the Superior nor the Supreme Court is limited to a judgment of affirmance or reversal; but that the Superior Court may

"in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received."

and that

"in case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received."

It thus clearly appears that both courts have legislative authority in determining the rate base, superior to that of the Department.

Considerations of "comity and convenience" require the court to hold that, until plaintiffs have exhausted their right to relief in the

Superior and Supreme Courts—relief, in part at least, legislative in character, these causes must be stayed.

Prentis v. Atlantic Coast Line, 211 U. S. 210;
The Public Utilities Commission of the District of Columbia vs. Potomac Electric Power Company et al., (Decided by U. S. Sup. Ct. Apr. 9, 1923).
[fol. 317] William A. Prendergast et al. vs. New York Telephone Company, (Decided by U. S. Sup. Ct. Apr. 16, 1923).
Bacon v. Rutland R. R. Co., 232 U. S. 134.

Granted the power, it is not practicable for the Department, the State or Cities to indemnify the plaintiffs in these cases, should plaintiffs in the end prevail and establish the right to higher rates. The reason that it is impracticable is on account of the inconvenience and disproportionate cost to the Department, State and Cities in securing indemnity from each of the telephone users against the contingency of the higher rates being determined in the end the proper rates. It is obvious, on account of changes in those making use of the service furnished by the plaintiffs and the small amounts involved in the individual transactions that it is unreasonable to ask them to look to such users for such indemnity should they ultimately prevail. It is, therefore, clear that—should the showing made establish with reasonable certainty the confiscatory nature of the rates ordered—plaintiffs, upon giving an adequate bond for the protection of those concerned, in case plaintiffs fail to establish their contention, are entitled to have the objectionable rates stayed pending final determination.

The extent of the stay in the Thurston County case is not made clear. It will be assumed that it does not stay the enforcement of the rate attacked by plaintiffs. While the Thurston County case is not one brought to "enforce" the Department's "order," it is one seeking a lower rate than that of such order, and, therefore, puts the Department to the defense of the order which plaintiffs here attack in cause No. 166-E.

[fol. 318] The Pacific Telephone & Telegraph Company is made a defendant in the Thurston County case. While the City of Seattle, plaintiff therein, has not secured a stay of the order attacked by plaintiffs herein, and it does not appear that the Pacific Telephone and Telegraph Company has asked for such a stay and been refused, the Superior Court and the Supreme Court of the State of Washington being vested, by section 10441, with legislative authority superior to that of the Department, this suit must be stayed until such time as plaintiffs have sought such relief from those courts under the state law. If denied a stay of the objectionable order by the State court upon such review, and if denied such stay in the Thurston County case now pending, and such denials are affirmed by the State Supreme Court, the applications herein for a preliminary injunction may be renewed.

Prentis v. Atlantic Coast Line, 211 U. S. 210;
Bacon v. Rutland R. R. Co., 232 U. S. 134 at 137;
Oklahoma Natural Gas Co. v. Campbell Russell, et al., (Decided by Sup. Ct. of U. S. Mar. 5, 1923).

The same considerations which require that the preliminary injunction be denied, necessitate the dissolution of the restraining order. Reaching this conclusion, the question of the rates, whether fair, reasonable or confiscatory in character, has not been considered.

Judge William B. Gilbert, concurs.

Judge Jeremiah Neterer, concurring, states:

[fol. 319] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

CONCURRING OPINION—Filed May 23, 1923

NETERER, D. J.: I agree with the conclusion of Judge Cushman that on consideration of comity and convenience this court should not interfere where the plaintiff has *open* a higher court of the state. The Prentis Case, 211 U. S. 210; Puget Sound Elec. Ry. Co. v. Lee, 207 Fed. 801, until the State remedy is exhausted. The plaintiff by its acts has become an adopted creature of the State, enjoying the rights and privileges provided by its law, and is subject to the control thereof. The state accords it a right of eminent domain, and it becomes amenable to the Washington Public Service Commission Law. This law provides for establishing reasonable rates for public service. Provision is made for hearing and finding, and for review, Rem. C. 10428, before the Superior Court and for appeal to the Supreme Court from such judgment, R. C. 10430.

This court has jurisdiction by reason of the fifth and fourteenth amendments only. It has no revisory power and may not amend or modify a rate in the chancery sense, but is confined to the judicial determination of the controversy on the facts, and may not enter the administrative or legislative issue, Public Utilities, etc. v. Potomac Elec. Power Co. U. S. Supreme Court, April 9, 1923. I also desire to say that in my opinion the majority of the Commission have the right conception that consideration should be given to the $2,500,000 (round numbers) in the depreciation surplus fund, and an adjusted compensation for the 4½ per cent contract with the Parent Company. Whether the proper consideration was given is not now before the court.

(Signed) Jeremiah Neterer.

[File endorsement omitted.]

[fol. 320] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 16, 1923

Comes now The Pacific Telephone and Telegraph Company, a corporation, plaintiff in the above entitled cause, and files the following Assignments of Error on which it will rely on its appeal from the interlocutory order entered in the above entitled cause on the 30th day of April, 1923:

I. The court erred in denying plaintiff's motion for an interlocutory injunction.

II. The court erred in not granting the motion of said The Pacific Telephone and Telegraph Company for an interlocutory injunction.

[fol. 321] III. The court erred in refusing to hold that the order of the Department of Public Works of Washington, rendered March 31, 1923, deprives plaintiff of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

IV. The court erred in holding that if the order of the Department of Public Works of Washington, rendered March 31, 1923, deprives plaintiff of its property without due process of law, nevertheless the above entitled suit should be stayed until said The Pacific Telephone and Telegraph Company has applied to the State courts of Washington for relief against the enforcement of said order and such relief has been refused by said State courts.

V. The court erred in holding that the order of the Department of Public Works of Washington, rendered March 31, 1923, was not the final legislative act under the laws of the State of Washington.

VI. The court erred in holding that Chapter 182 of the Session Laws of the State of Washington for the year 1913, is not, in so far as it purports to confer legislative power upon the courts of the State of Washington, in violation of and contrary to Article II, Section 1, and Article IV, Section 1, of the Constitution of the State of Washington.

[fol. 322] VII. The court erred in holding that the pendency of a certain cause in the Superior Court of the State of Washington for Thurston County, entitled: "The State of Washington, ex rel., The City of Seattle, a municipal corporation, Petitioner and Relator, v. S. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington, exercising jurisdiction in the Division of Public Utilities un-

der the 'Public Service Commission Law'; and The Pacific Telephone and Telegraph Company, a corporation, Respondents," requires that this suit pending in the United States District Court for the Western District of Washington, Southern Division, be stayed.

VIII. The court erred in not holding that Chapter 182 of the Session Laws of the State of Washington for the year 1913 is contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States so far as said Chapter 182 precludes a determination of the value of the property of the above named plaintiff as of the time when an inquiry was made by the Department of Public Works of the State of Washington in 1923 regarding rates.

Wherefore, in order that the foregoing Assignment of Errors may be and appear of record, plaintiff presents the same to the court and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such cases made and provided; and plaintiff prays that said interlocutory order of [fol. 323] April 30, 1923, be reversed, set aside and held for naught, and that an order granting plaintiff's motion for an interlocutory injunction be entered by the court.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Plaintiff. W. V. Tanner, Of Counsel.

[File endorsement omitted.]

[fol. 324] In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Petition for Allowance of Appeal—Filed July 16, 1923

The above named, The Pacific Telephone and Telegraph Company, feeling itself aggrieved by the order rendered in the above entitled cause on the 30th day of April, 1923, denying the motion of The Pacific Telephone and Telegraph Company for an interlocutory injunction in said cause, does hereby appeal from said order to the Supreme Court of the United States, and prays that this its appeal may be allowed and that a transcript of the record and proceedings in said cause, and all things concerning the same upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herein filed by said The Pacific Telephone [fol. 325] and Telegraph Company may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Petitioner. W. V. Tanner, Of Counsel.

[File endorsement omitted.]

[fol. 326] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 16, 1923

It is hereby ordered, that the appeal prayed for by the above named plaintiff in the above entitled cause, to the Supreme Court of the United States, be and the same hereby is allowed as prayed.

Done in open court this 16th day of July, 1923.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 327] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

ORDER FIXING AMOUNT OF BOND ON APPEAL—Filed July 16, 1923

On reading the petition of the above named plaintiff in the above entitled cause, for the allowance of an appeal to the Supreme Court of the United States from the order rendered in said cause on April 30, 1923, denying the motion of plaintiff for an interlocutory injunction in said cause, it is ordered that the plaintiff above named execute and file in the office of the Clerk of the above named court, a bond on appeal, conditioned according to law, in the sum of Five Hundred & no/100 Dollars, with good and sufficient surety to be approved by the undersigned.

Done in open court this 16th day of July, 1923.

Edward E. Cushman, Judge.

[fol. 328] [File endorsement omitted.]

[fols. 329 & 330] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

BOND ON APPEAL FOR $500.00—Approved and filed July 16, 1923; omitted in printing

[fol. 331] [File endorsement omitted.]

[fol. 332] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

CITATION—Filed July 16, 1923; omitted in printing

[fol. 333] Due and proper service of the above and foregoing citation is hereby accepted and acknowledged this 17 day of July, 1923.

John H. Dunbar, Raymond W. Clifford, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 334] ACCEPTANCE OF SERVICE

Due, regular and timely service of the Citation on Appeal in the above entitled cause from the United States District Court for the Western District of Washington, Southern Division, to the Supreme Court of the United States, of the Præcipe for Record on Appeal in said cause, of the Petition for Allowance of Appeal, of the Order Allowing Appeal, of the Assignment of Errors, of the Order Fixing Amount of Bond on Appeal, and of the Appeal Bond in said cause, is hereby admitted this 17 day of July, 1923.

John H. Dunbar, Raymond W. Clifford, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 335] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed July 17, 1923

To the Clerk of the above-entitled court:

Please make and certify on appeal to the Supreme Court of the United States a record which includes the following files, to-wit:

1. Bill of Complaint and Exhibits;

2. Subpœna and Marshal's return thereto;

3. Temporary restraining order;

4. Affidavits of C. T. Blanck, C. S. Cassasa, P. H. Coolidge, C. E. Fleager (2 thereof), Henry L. Gray, Ralph H. MacMichael, J. C.

Nowell, W. J. Phillips, offered in evidence by plaintiff in support of [fol. 336] its application for an interlocutory injunction;

5. Motion of defendants to dismiss plaintiff's complaint;

6. Motion of defendants to dissolve restraining order, together with affidavit attached thereto;

7. Motion of defendants to stay proceedings in the above entitled suit and exhibit thereto attached;

8. Affidavit of E. C. Ridley filed in opposition to application for interlocutory injunction;

9. Order of April 30, 1923, denying interlocutory injunction;

10. Opinion filed May 23, 1923, on application for interlocutory injunction;

11. Assignment of Errors;

12. Petition for allowance of appeal;

13. Order allowing appeal;

14. Order fixing amount of bond on appeal;

15. Bond on appeal;

16. Citation;

17. Acceptance of service;

18. This præcipe with acceptance of service thereof.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Plaintiff. W. V. Tanner, Of Counsel.

[fol. 337] [File endorsement omitted.]

[fol. 338] UNITED STATES OF AMERICA,
Western District of Washington, ss:

CLERK'S CERTIFICATE

I, F. M. Harshberger, Clerk of the District Court of the United States of America, for the Western District of Washington, do hereby certify and return to the claim of appeal of The Pacific Telephone and Telegraph Company, from a certain order dated April 30, 1923, in a cause pending in said court wherein The Pacific Telephone and Telegraph Company, a corporation, is plaintiff, and E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of Washington, and

John H. Dunbar, Attorney General of the State of Washington are defendants, that the above and foregoing and within transcript of record, pages numbered 1 to 339 inclusive, is a true copy of all papers filed and proceedings had and entered in said cause as the same appear on file and of record in my office; that I have compared the same with the originals, and they are true and correct transcripts therefrom and of the whole thereof.

I further certify that I hereto attach and herewith transmit the original citation in said cause with acceptance of service on said writ.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges as incurred and paid in my office by and on behalf of appellant herein, for making record, certificates and return to the Supreme Court of the United States in the above entitled cause, to-wit:

[fol. 339] Filing appeal papers, orders, etc., and issuing citation	$7.00
Clerk's Fees (Sec. 828 R. S. U. S.) for making record, certificate and return, 722 folios at 15¢	108.30
Certificate of clerk to record, 4 folios at 15¢ and seal	.80
Total	$116.10

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Tacoma, in said District, this 28th day of August, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-eighth.

F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, By Ed. M. Lakin, Deputy.

[fols. 340 & 341] Copy of citation omitted in printing.

[fol. 342] [File endorsement omitted.]

Endorsed on cover: File No. 29,850. Western Washington D. C. U. S. Term No. 540. The Pacific Telephone and Telegraph Company, appellant, vs. E. V. Kuykendall, as Director of Public Works of Washington, et al., etc., et al. Filed September 10th, 1923. File No. 29,850.

DEC 1 19
WM. R. STAN
C

IN THE

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1923

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,
v.
E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

No. 540

PETITION IN ANSWER TO MOTION TO ADVANCE

JOHN H. DUNBAR,
Attorney General of the State of Washington.

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington.

Counsel for Appellees.

FRANK M. LAMBORN, PUBLIC PRINTER

FILED
DEC 1 19
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Appellees.

No. 540

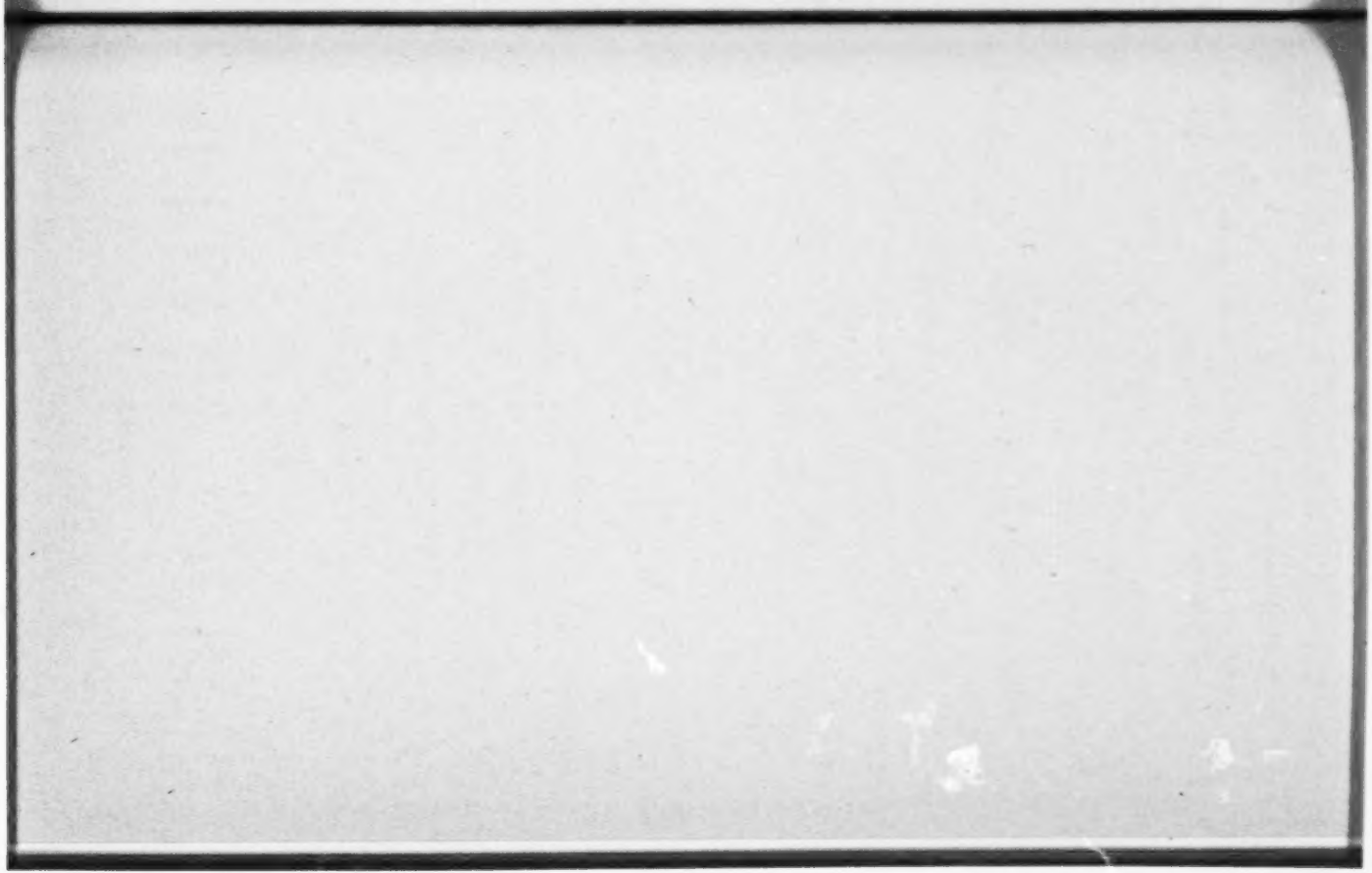
PETITION IN ANSWER TO MOTION TO ADVANCE

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

Counsel for Appellees.

FRANK M. LAMBORN, PUBLIC PRINTER



IN THE

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OCTOBER TERM, 1923

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
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E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

No.....

PETITION IN ANSWER TO MOTION TO ADVANCE

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

Counsel for Appellees.

IN THE

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1923

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,
v.
E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.
No.....

NOTICE

To—

H. D. PILLSBURY, ESQ.,
FRANK T. POST, ESQ.,
W. V. TANNER, ESQ.,
Counsel for Appellant.

PLEASE TAKE NOTICE that on Monday, December 3, 1923, at 12 o'clock noon, or as soon thereafter as counsel may be heard, E. V. Kuykendall,

as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of Washington, and John H. Dunbar, the Attorney General of the State of Washington, Appellees, will submit to the Supreme Court of the United States a petition in answer to motion to advance, a copy of which is attached hereto, petitioning said court to pass said motion to advance for consideration until the determination of the petition for certiorari in the case of Honorable Edward E. Cushman, District Judge of the United States for the Western District of Washington, Southern Division, Petitioner, v. The Pacific Telephone and Telegraph Company, Respondent.

Dated November 24, 1923.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellees.

By JOHN H. DUNBAR, Attorney General of the State of Washington, and RAYMOND W. CLIFFORD, Assistant Attorney General of the State of Washington,

Their Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,
v.
E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.
No.....

PETITION IN ANSWER TO MOTION TO ADVANCE.

The petitioners are appellees herein; with the exception of the appellee Dunbar, they constitute the Department of Public Works of the State of Washington, a regulatory body of that State having jurisdiction over the rates which are the subject of this bill. The exchange rates, a denial of increase in

which gave rise to this suit, are the war time rates made effective by the Postmaster General while he was in possession and control of the system of appellant by authority of a resolution of Congress and proclamation of the President. They were refiled by appellant at the conclusion of Federal control and continued in effect immediately upon such conclusion by affirmative order of the State regulatory body. The toll rates of appellant are also the war time rates of the Postmaster General.

On application for interlocutory injunction herein, a court of three judges constituted as provided in section 266, Judicial Code, held that it was lacking in jurisdiction until a resort to and exhaustion of the remedies provided by State law (cf. Motion to Advance, p. 10). When shortly thereafter appellant sought to prosecute the merits before the district judge in whose court the bill was filed, Honorable Edward E. Cushman, that court declined to pass upon pleadings directed to the merits until the fundamental jurisdictional defect found by the statutory court had been removed. Appellant next took this appeal, the advancement of which it now moves; appellees made prompt appearance. Appellant then applied to the Circuit Court of Appeals for the Ninth Circuit, for mandate to compel Judge Cushman to proceed with the trial upon the merits (Motion to Advance, p. 8), and the same was granted. Counsel for appellees in the instant appeal represented Judge Cushman in the mandamus proceeding at his request,

and since denial of the petition for rehearing in the mandamus cause have been authorized to apply to this court for writ of certiorari to review the proceedings before the Circuit Court of Appeals culminating in peremptory mandate. Preparation of a petition to this court for certiorari was commenced forthwith. The appearance and fee required, the petition for certiorari, and the certified copy of the record for printing have been transmitted to the clerk of this court, with instruction to docket, and the petition will be noticed for hearing before this court January 7, 1924. The affidavit of John H. Dunbar regarding the same is attached.

Appellees pray that the motion to advance be passed for consideration until the determination of the petition for certiorari in the mandamus proceeding, and that upon the granting of such petition the instant proceeding and that by way of certiorari be consolidated.

This petition is not made for the purpose of delay, but is of right by reason of the following:

1. The mandate of the Circuit Court of Appeals for the Ninth Circuit is peremptory, the remittitur was sent down forthwith, and the trial court is required thereby to proceed with the merits. The appeal sought to be advanced involves only jurisdictional matters. The allowance of certiorari and consequent stay of the proceeding before the trial court is necessary, else the proceeding on the merits and the expense thereof will be for naught in event the

decision of the statutory court denying jurisdiction is affirmed.

2. Appellant contends (Motion to Advance, p. 9) that the Circuit Court of Appeals decided in the mandamus proceeding the identical questions that are before this court upon the present appeal. Conceding this for argument only, and not admitting the same, appellees are entitled to stay by certiorari and litigate the rule requiring procedure with the merits where trial may be for naught.

3. The showing denying fair return as set forth by appellant in its bill and affidavits filed for hearing before the statutory court was controverted by the affidavit of appellee Kuykendall. It was shown, *inter alia*, that depreciation expense claimed was excessive and in part not properly allowable, and the expense of alleged services and materials said to be furnished by the parent concern of appellant far greater than a reasonable expense for such services and materials as were in fact furnished. The statutory court, examining the bill with respect to jurisdiction found that issues involving valuation were presented.

4. It was contended on behalf of Judge Cushman in the mandamus proceeding that the jurisdictional defect disclosed by the bill in the instant case and found by the statutory court, was an impediment alike to the application for interlocutory injunction and the prosecution of the merits. On the other hand, appellant contended that the jurisdictional defect

extended only to the interlocutory application. It is plain that if the instant appeal is determined in accord with appellant's contention restricting the jurisdictional issue, the statutory court being nevertheless sustained with respect to the existence of such jurisdictional defect, and without the allowance and consolidation of the proceeding by way of certiorari, appellees will be compelled to meet on trial the issues raised by the prayer for permanent injunction notwithstanding.

WHEREFORE, appellees pray that the motion to advance be passed for consideration until the determination of the petition for certiorari in the mandamus proceeding, and that upon the granting of such petition the instant proceeding and that by way of certiorari be consolidated.

E. V. KUYKENDALL,
as Director,

HANCE H. CLELAND and
FRANK R. SPINNING,
as Supervisors of the Department of Public Works of the State of Washington,

and

JOHN H. DUNBAR,
Attorney General of the State of Washington,
Appellees,

By JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,
Counsel for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,
v.
E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

No.....
Affidavit

UNITED STATES OF AMERICA,
STATE OF WASHINGTON,
COUNTY OF THURSTON. } SS.

John H. Dunbar, being first duly sworn, on oath deposes and says:

That he is the duly appointed, qualified and acting Attorney General of the State of Washington and of counsel for the appellees in the above entitled cause.

That he is also of counsel for the Honorable Edward E. Cushman, Judge of the United States District Court for the Western District of Washing-

ton, Southern Division, who was the respondent in a certain action in mandamus before the United States Circuit Court of Appeals for the Ninth Circuit, entitled therein No. 4070, The Pacific Telephone and Telegraph Company, a corporation, Petitioner, v. Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division.

That the proceedings in said mandamus action resulted in the rendering of a decision by the said Circuit Court of Appeals on October 17, 1923, which decision is set forth in full as Appendix "A" to the appellant's motion to advance filed herein, and that pursuant to said decision a peremptory writ of mandamus was issued by said Circuit Court of Appeals directing said Honorable Edward E. Cushman to vacate a certain order made by him in the above entitled cause in the District Court on July 9, 1923, and further requiring him to proceed to hear and determine the defendants' motion to dismiss the above entitled action in the District Court.

That said Circuit Court of Appeals allowed the respondent in said mandamus proceedings fifteen days within which to file a petition for rehearing, and said petition for rehearing was thereafter filed within said time and was denied by said Circuit Court of Appeals on November 12, 1923.

That this affiant has been authorized by said Honorable Edward E. Cushman to apply to this

honorable court for a writ of certiorari to review the decision and order of said Circuit Court of Appeals.

That affiant is proceeding diligently to perfect the petition to this honorable court for such writ of certiorari, and at this time has obtained from the clerk of the said Circuit Court of Appeals a certified transcript of the record in said court in said cause, and has this day mailed to the clerk of this honorable court a petition signed in writing by counsel for said Honorable Edward E. Cushman, together with said certified transcript of the record in said cause, an order of appearance in said cause and a deposit of Twenty-five Dollars ($25.00) to apply on costs, and has requested the clerk of this honorable court to docket said cause and to have the record therein printed as quickly as possible.

That this affiant is now preparing a brief in support of said petition for a writ of certiorari, and as soon as possible said petition and brief will be printed and served upon opposing counsel and notice of such service will be hereafter filed in this honorable court.

That it is the intention of affiant to take all steps necessary to perfect the said petition for a writ of certiorari as soon as possible, and affiant believes that the said petition can and will be presented to this honorable court for its determination on Monday, January 7, 1924.

This affidavit is made in support of appellees' petition in answer to motion to advance in the above

entitled cause, and is not made for the purpose of delay.

JOHN H. DUNBAR.

Subscribed and sworn to before me this 24th day of November, A. D. 1923.

CHAS. O. FLINT,

Notary Public in and for the State of Washington, residing at Olympia, Washington.

FEB 18 1924
WM. R. STANSBU
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington.
Appellees.

No. 540

MOTION TO DISMISS

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

H. C. BRODIE,
Counsel for Appellees.

FRANK M. LAMBORN, PUBLIC PRINTER, OLYMPIA

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington.
Appellees.

No. 540

MOTION TO DISMISS

JOHN H. DUNBAR,
Attorney General of the State of Washington.

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington.

H. C. BRODIE,
Counsel for Appellees.

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In the Supreme Court of the United States

OCTOBER TERM, 1923

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,
v.
E. V. KUYKENDALL, as Director of Public Works of Washington, *et al.*,
Appellees.

No. 540

ACKNOWLEDGMENT OF SERVICE

Service of a copy of the within Notice, Motion to Dismiss, Statement and Argument is hereby admitted by the undersigned at Seattle, Washington, this 11th day of February, 1924.

C. M. BRACELEN,
OTTO B. RUPP,
H. D. PILLSBURY,
FRANK T. POST,
W. V. TANNER,
Counsel for Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*, v. E. V. KUYKENDALL, as Director of Public Works of Washington, *et al.*, *Appellees.*	No. 540

NOTICE

TO THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Appellant, and to C. M. BRACELEN, OTTO B. RUPP, H. D. PILLSBURY, FRANK T. POST and W. V. TANNER, counsel for appellant:

Please take notice that on Monday, March 24, 1924, at 12 o'clock, noon, or as soon thereafter as counsel may be heard, the appellees herein will submit to the consideration of the court their motion to dismiss, copy of which is attached.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

H. C. BRODIE,
Counsel for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,
v.
E. V. KUYKENDALL, as Director of Public Works of Washington, *et al.*,
Appellees.

No. 540

MOTION TO DISMISS

Now come the appellees herein and move the court to dismiss the appeal from an order denying an interlocutory injunction herein upon the following grounds:

I.

That this court will not review the order denying an interlocutory injunction for the reason that the question of relief *pendente lite* has become moot by dismissal of the complaint therein.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

H. C. BRODIE,
Counsel for Appellees.

STATEMENT.

For the purpose of the motion hereinbefore set out, the facts involved may be stated as follows:

The Pacific Telephone and Telegraph Company, on the 24th day of April, 1923, filed in the district court of the United States, for the western district of Washington, southern division, its bill of complaint against the appellees herein. In said complaint, in addition to other matters, the appellants prayed for a temporary injunction to restrain the appellees herein from enforcing a certain rate order of the department of public works of the state of Washington. On April 30, 1923, the application of the appellant for an interlocutory injunction came on to be heard before the statutory court of three judges provided for in section 266 of the Judicial Code, and said application was denied, and from said order this appeal was prosecuted to this court.

Thereafter such proceedings were had in said case in the district court as resulted in the entry of an order dismissing the bill of complaint therein by the said court on the 5th day of January, 1924. From said order of dismissal, an appeal has been taken to this court and is now pending herein as cause No. ..... The transcript of record in said appeal from said final order has not yet been printed, but for the information of the court in passing on this motion, said order of dismissal is set forth in full as follows:

In the District Court of the United States, for the Western District of Washington

SOUTHERN DIVISION

IN EQUITY. No. 166-E

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Plaintiff,
v.
E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington.
Defendants.

DECREE

This cause having come on regularly for hearing in this court on the 31st day of December, 1923, upon the defendants' motion to dismiss the bill of complaint filed herein, plaintiff being represented by Messrs. Otto B. Rupp and W. V. Tanner, its solicitors, and the defendants being represented by John H. Dunbar, Attorney General of the State of Washington, and Raymond W. Clifford, his assistant, and Messrs. H. C. Brodie, Thomas J. L. Kennedy and

E. K. Murray, their solicitors, and after hearing the arguments of counsel for the respective parties, the court having announced its oral opinion and decision that the motion to dismiss should be sustained upon the grounds that the bill of complaint herein does not state any matters of equity entitling the complainant to the relief prayed for; that said bill of complaint does not state facts sufficient to entitle complainant to any relief against the defendants; and that said bill has been prematurely brought, by reason of the failure to exhaust the right of plaintiff to relief in the superior and supreme courts of the state of Washington;

Now, on this 5th day of January, 1924, the parties herein now appearing by their respective counsel, on motion of the defendants, pursuant to such decision of the court, it is by the court hereby ORDERED, ADJUDGED and DECREED that said motion to dismiss be and it is hereby granted, and that said bill of complaint and this cause of action be and the same hereby are dismissed, and that the defendants have and recover their costs and disbursements herein.

To the foregoing, and each and every part thereof, the plaintiff excepts, and its exception is allowed.

Done in open court this 5th day of January, 1924.

EDWARD E. CUSHMAN,
Judge.

ARGUMENT.

I.

The application for an interlocutory injunction was an application for relief *pendente lite,* and upon the dismissal of the litigation by the foregoing final order, no relief *pendente lite* could be afforded and the question of such relief becomes a moot question, and under innumerable decisions of this court, a moot question will not be passed upon.

Brownlow v. Schwartz, 67 L. ed. 288,
Atherton Mills v. Johnston, 259 U. S. 16,
Heitmuller v. Stokes, 256 U. S. 359,
American Book Company v. Kansas, 193 U. S. 49,
Mills v. Green, 159 U. S. 651,

and numerous other cases cited in the above cases.

II.

When an appeal has been taken from an order denying an interlocutory injunction, and thereafter an order is entered dismissing the complaint and an appeal is prosecuted from such final order of dismissal, the interlocutory appeal should be dismissed and the case considered on the appeal from the final order of dismissal.

Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445.

It is therefore respectfully submitted that the motion to dismiss the appeal from the order denying an interlocutory injunction should be granted.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

H. C. BRODIE,
Counsel for Appellees.

FILED
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No. 540.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION.

Brief of Appellant in Opposition to Motion to Dismiss Appeal.

C. M. BRACELEN,
W. V. TANNER,
Of Counsel.

OTTO B. RUPP,
FRANK T. POST,
H. D. PILLSBURY,
Solicitors for Appellant.

Law Brief Printing Co., Seattle

No. 540.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION.

Brief of Appellant in Opposition to Motion to Dismiss Appeal.

Statement.

This is an appeal from an order entered April 30, 1923, by a statutory court (convened pursuant to section 266 of the Judicial Code) denying an application of The Pacific Telephone and Telegraph Company, appellant here, for an interlocutory in-

junction to restrain the appellees from enforcing a confiscatory rate order of the Department of Public Works of the State of Washington. This denial was not on the merits, but upon the sole ground that appellant had not as yet exhausted its purported legislative remedies in the state courts of Washington.

After the denial of the interlocutory injunction, the District Judge refused to proceed in the main case. Thereupon, an application was made to the Circuit Court of Appeals for the Ninth Circuit, for a writ of mandamus commanding the District Judge to proceed. The writ was granted. (*Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930.) Thereafter the District Judge on January 5, 1924, entered a decree dismissing the complaint. From this decree of dismissal an appeal was likewise taken to this court and is now pending here as cause No. 790.

On motion an order was made by this court on February 25, 1924, advancing this cause (No. 540) and the related cause (No. 790) on the calendar, and setting them down for argument together on April 14, 1924. Meanwhile the appellees on February 11, 1924, moved to dismiss the appeal in this cause, arguing that the question therein involved

had become moot. This motion to dismiss was noted for argument for March 24, 1924.

In view of this court's order advancing this cause and cause No. 790 for argument on the merits on April 14, 1924, it would seem desirable that the whole argument in these two related cases be had on the same day rather than piecemeal, and that therefore the motion to dismiss the appeal should be passed for consideration until April 14th.

Argument.

In order to determine whether appellees' motion to dismiss the appeal on the ground that the question has become moot, is well taken, the precise nature of the question involved in this appeal and the status of the litigation must be considered.

The only question before the court on this appeal from the order denying an injunction *pendente lite* is whether appellant had the right to sue in the United States court at the time it filed its complaint, or whether as a condition precedent appellant was first required to exhaust its alleged legislative remedies in the state courts of Washington.

As already stated the statutory court did not pass on the merits. Hence, on this appeal, this court will determine the jurisdictional question only, and if it holds that the statutory court was wrong in refusing to pass on the merits of the application, will remand the cause to the statutory court for that purpose.

An analogous situation was presented in *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293, where, after determining that the statutory court erred in refusing to pass on the merits of the application for an interlocutory injunction, this court said:

"As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered, the cases should be remanded to that Court, with directions to proceed to the trial. Generally it is not desirable that we should pass upon such matters until they have been dealt with below."

As, therefore, this court will not in general pass on the merits of the application for relief *pendente lite* before that question has been considered below, there is in this appeal no question of injunctive *relief* but merely a jurisdictional question.

Clearly, the argument of the appellees, that the question is moot because *no relief pendente lite* may be granted, is unsound because no relief *pendente lite* would be granted by this court in any event. Hence it cannot be said that the case is moot on the usual ground that a decree would be wholly ineffectual and inoperative. If moot at all, it must be on some other ground. But this cause can only be moot if the adjudication of the jurisdictional question has become wholly immaterial. Has it? The answer is that question depends upon whether the litigation has ceased or is still pending. If the litigation is still pending, then the question of jurisdiction in this case, as in every other case, is still a vital one; in fact, it is the *sine qua non* of the suit. Although after the present appeal from the order of the statutory court denying relief *pendente lite*, the trial judge during subsequent proceedings in the main cause below dismissed the complaint, yet an appeal from the decree was immediately taken. That a cause on appeal is still a pending cause hardly requires citation of authority.

Ex parte Craig, 274 Fed. 177, 187;
Gore v. Stacpoole, 1 Dow. (H. L.) 18, 31;
Holland v. Fox, 3 El. & Bl. 977, 985;
Howell v. Bowers, 2 Cr. M. & R. 621;;

Brasch v. Brasch, 50 Neb. 73;

Boone v. Boone, 160 Iowa 284;

Hupp v. Hocking Oil & Natural Gas Co., 88 Ohio St. 61;

Ex parte James Mumford, 57 Mo. 603, 606;

In re Egan, 24 S. D. 301;

State Board of Examiners v. Hart, 104 Minn. 88;

Pemberton v. Pemberton, 169 Ky. 476.

As the cause is still pending, the jurisdictional question must be determined. The motion to dismiss this appeal, therefore, raises only a question of practice: whether the jurisdictional question will be determined on this appeal from the order of the statutory court, or on the appeal from the decree of dismissal of the District Judge. The question not being moot and section 266 of the Judicial Code having provided for a separate appeal from an order denying the interlocutory injunction, it would seem that the question should be determined in the appeal where it is first raised.

Counsel rely upon *Shaffer v. Carter*, 252 U. S. 37, but they misconstrue the effect of that decision. In that case there were two appeals from a single decree rendered in a suit in equity heard before a

statutory court. The statutory court not only denied the application for the interlocutory injunction, but also dismissed the complaint by the same decree. Assuming that the statutory court which, under section 266, is expressly given only the power to grant or deny an interlocutory injunction, also has the power to dismiss the complaint for want of equity, still in that case there was only one decree, a final decree, in which was merged the order denying the interlocutory injunction. Obviously an appeal could not be taken from that final decree on the theory that it was interlocutory but only on the theory that the decree was final. That case is, therefore, merely authority for the proposition that where a statutory court (convened pursuant to section 266) in addition to denying the application for an interlocutory injunction dismisses the complaint in the same decree, an appeal should be taken from the final decree of dismissal under section 238 of the Judicial Code.

Here the situation is entirely different. In this case an appeal is taken, pursuant to section 266, from an order of the statutory court, denying relief *pendente lite*, and eight months later the District Judge, in whose court the main case was pending, entered a decree of dismissal from which an

appeal is taken. Here it can hardly be said that an order of the statutory court is merged in the final decree of the District Judge. There can be no merger under such circumstances. If, therefore, the question involved in the appeal from the interlocutory injunction is not moot and if the order of the statutory court is not merged in the decree of dismissal of the District Judge, then the appeal in this cause cannot be dismissed but it must be determined in due course.

In the case of *Male v. The Atchison, Topeka & Santa Fe Railroad Company*, 240 U. S. 97, a motion was made to dismiss an appeal for want of jurisdiction. The reason assigned for the motion was that the question involved on the appeal had become moot in that after the rendition of the order of the lower court declining to take jurisdiction, the appellant had sued upon the same alleged cause of action in the Supreme Court of the State of New York, where a final judgment on the merits was entered dismissing the complaint. This court refused to dismiss the appeal, assigning as its reason for its refusal that it was concerned with the jurisdictional question only, and that the motion to dismiss was based on matter going to the merits. This court, therefore, proceeded to determine the ques-

tion as to whether the lower court as a United States court had power to entertain the cause.

So in the present case the question before this court is whether the statutory court as a United States court should have entertained the cause and passed upon the question of relief *pendente lite.* This question still remains regardless of the decree of dismissal of the District Judge, from which an appeal has also been taken.

It may possibly be that if, after the decree of dismissal was entered in this cause by the District Judge, no appeal had been taken therefrom, and the time for appeal had expired, this court might not adjudicate the question whether the statutory court should have assumed jurisdiction, but such is not the case.

The case of the *City of Wallace v. Deane* (Idaho) 69 Pac. 62 is in point. In that case an appeal was taken from an order of the District Court dissolving a temporary injunction. Subsequently in the main cause below a final judgment was entered in favor of the defendant, from which final judgment no appeal was taken and the *time for appeal had expired.* Upon this ground the motion to dismiss the appeal was sustained since the controversy had com-

pletely ceased. Applying that reasoning to the present case, it follows that where an appeal has been taken from a final judgment dismissing the complaint, the controversy has not ceased and an appeal from an order denying a temporary injunction still presents a justiciable question.

Should this court, however, be of the opinion that the jurisdictional question should not be separately considered upon the present appeal, it will and must consider that question upon appeal from the final decree of the District Judge dismissing the complaint. This is true because this court must in any event determine the jurisdictional question, and secondly because if the appeal from the denial of the interlocutory injunction will not be separately considered, still upon appeal from the final decree every interlocutory order affecting the rights of the parties regarding the matters in question between them, is subject to review in the appellate court and will be decided at the same time.

Central Trust Company v. Seasongood, 130 U. S. 482;

Perkins v. Fourniquet, 6 How. 206, 209;

Forgay v. Conrad, 6 How. 201;

Texas Company v. Central Fuel Oil Co., 194 Fed. 1, 22;

Western Union Telegraph Co. v. The U. S. and Mexican Trust Company, 221 Fed. 545, 551.

While the rule of these cases ordinarily applies only where no separate appeal is provided by statute from an interlocutory order, still if in the opinion of this court the condition of this cause is now such that the appeal from the interlocutory order should no longer be separately considered, then the rule applies with full force and this court will, upon appeal from the final decree, consider the question of whether the interlocutory order was properly made.

Respectfully submitted,

OTTO B. RUPP,
FRANK T. POST,
H. D. PILLSBURY,
Solicitors for Appellant.

C. M. BRACELEN,
W. V. TANNER,
Of Counsel.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 789

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

E. V. KUYKENDALL, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED FEBRUARY 4, 1924

(30,099)

(30,099)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 789

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

E. V. KUYKENDALL, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 21, 1924

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[fol. 1] NAMES AND ADDRESSES OF SOLICITORS

Rupp, Otto B., 660-671 Colman Building, Seattle, Washington; Post, Frank T., Exchange National Bank Building, Spokane, Washington; Higgins, Thomas B., Exchange National Bank Building, Spokane, Washington; Russell, Antone E., Exchange National Bank Building, Spokane, Washington; Pillsbury, E. S., Standard Oil Building, San Francisco, California; Madison, Frank D., Standard Oil Building, San Francisco, California; Sutro, Alfred, Standard Oil Building, San Francisco, California; Sutro, Oscar, Standard Oil Building, San Francisco, California; Pillsbury, H. D., Standard Oil Building, San Francisco, California, Solicitors for Appellants; W. V. Tanner, Seattle, of counsel.

Dunbar, John H., Attorney General of the State of Washington, Olympia, Washington; Clifford, Raymond W., Assistant Attorney General of the State of Washington, Olympia, Washington, Solicitors for Appellees.

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity. No. 166E

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

E. V. KUYKENDALL, as Director of Public Works of Washington; Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the Persons Constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney-General of the State of Washington, Defendants.

BILL OF COMPLAINT—Filed Apr. 24, 1923

To the Judges of the District Court of the United States for the Western District of Washington, Southern Division:

The Pacific Telephone and Telegraph Company, a corporation organized and existing under the laws of the State of California, brings this, its bill of complaint, against the defendants, and thereupon complains and charges as follows:

I. That it is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal [fol. 2] place of business at San Francisco, in said state, and is a citi-

zen of said state. That during all of the times referred to in this bill of complaint it has owned and operated and now owns and operates a telephone and telegraph system and has been and is now engaged in operating and conducting a public telephone and telegraph system in the state of Washington and elsewhere. That it has complied with all the laws of the State of Washington relating to foreign corporations, has paid its annual license fee last past due, and is duly authorized to do business therein.

II. That the defendant E. V. Kuykendall is the duly appointed, qualified and acting Director of Public Works of Washington, and is a citizen and resident of the Eastern District of Washington; that the defendant Hance H. Cleland is the duly appointed, qualified and acting Supervisor of Public Utilities of said state, and is a citizen and resident of the Eastern District of Washington; that the defendant Frank R. Spinning is the duly appointed, qualified and acting Supervisor of Transportation in said state and is a citizen and resident of the Western District of Washington. That said E. V. Kuykendall, Hance H. Cleland and Frank R. Spinning are the members of and constitute the Department of Public Works of the State of Washington. Said defendants will be hereinafter referred to as the Department. That the defendant John H. Dunbar is the duly appointed, qualified and acting Attorney-General of the State of Washington, and is a citizen and resident of the Western District of Washington.

III. This suit is of a civil nature in equity, is a controversy between citizens of different states and arises under the constitution and laws of the United States in that plaintiff seeks to enjoin the enforcement of an order made by the said Department of Public Works on March 31, 1923, which said order prescribes the maximum rates and charges to be charged by plaintiff for telephone service in the State of Washington, for the reason that said rates and charges are confiscatory of plaintiff's property used or useful in furnishing said service to the public, and, in consequence, said order seeks to deprive plaintiff of its property without due process of law, and denies to plaintiff the equal protection of the law in violation of its rights under the Fourteenth Amendment of the Constitution of the United States, and is therefore null and void.

The amount in controversy in this suit exceeds the sum or value of $3,000, exclusive of interest and costs.

IV. That on August 8, 1919, the Public Service Commission of Washington, an administrative body duly created by the statutes of said state, and the predecessor of, exercising like powers as the said Department of Public Works, made an order prescribing the maximum rates and charges to be charged by plaintiff on and after August 1, 1919, for telephone service, both exchange and toll, within the State of Washington. A copy of said rates applicable to Seattle and Tacoma, applicable to farmer line rates effective through-
[fol. 3] out the State, and toll rates effective therein, is filed here-

with, marked Exhibit "A" and hereby specially referred to and made a part hereof.

V. That on September 20, 1922, plaintiff filed with the said Department a schedule of rates to be charged by plaintiff for exchange telephone service in said state. That said schedule increased the rates to be charged for exchange telephone service in substantially all the exchanges owned and operated by plaintiff in the State of Washington.

VI. That on September 24, 1922, the said Department issued an order suspending for the full statutory period the operation of said rates so filed by plaintiff on September 20, 1922, and directing the plaintiff to file for the consideration of said Department a toll rate schedule conforming in principle with the toll rates filed by the plaintiff and effective prior to the war period.

VII. That on October 5, 1922, the plaintiff filed, as directed aforesaid, a toll rate schedule, a copy of which is filed herewith, marked Exhibit "B" and hereby specially referred to and made a part hereof, and concurrently therewith filed with said Department a withdrawal and cancellation of the rates filed by it on September 20, 1922, except the rates and charges applicable to the cities of Seattle and Tacoma. That schedule of rates so filed by it on September 20, 1922, for Seattle and Tacoma and not withdrawn and cancelled are filed herewith, marked Exhibit "C" and hereby specially referred to and made a part hereof.

VIII. That subsequent to the dates hereinbefore mentioned and between December 18, 1922, and March 1, 1923, said Department held numerous hearings in the State of Washington for the purpose of determining the value of plaintiff's property used or useful in rendering telephone service in the State of Washington; the reasonableness or unreasonableness of the rates and charges then being charged by plaintiff in said state; the reasonableness or unreasonableness of the schedule of rates and charges applicable to the toll service filed as aforesaid by plaintiff on October 5, 1922; and the reasonableness or unreasonableness of the schedule of exchange rates applicable to Seattle and Tacoma filed as aforesaid on September 20, 1922. That on the 31st day of March, 1923, two of the three members of said Department filed an order, a copy of which is filed herewith, marked Exhibit "D" and hereby specially referred to and made a part hereof, whereby the application of plaintiff to increase its rates for service was in all respects denied. That on the same date, to-wit, March 31, 1923, the Supervisor of Public Utilities and a member of said Department who was present at all of said hearings, filed a dissenting opinion, a copy of which is filed herewith, marked Exhibit "E" and hereby specially referred to and made a part hereof, by the terms of which he found that the rates, both toll and exchange then and theretofore being charged by plaintiff were unreasonable and less than sufficient, and in which he fixed certain rates, both toll and exchange, as reasonable and not more than sufficient. That

[fol. 4] said rates so found as reasonable by said Supervisor of Public Utilities, as set forth in said dissenting opinion (Exhibit "E"), are the rates set forth by plaintiff in the schedule filed herewith, marked Exhibit "F" and hereby specially referred to and made a part hereof, which the plaintiff proposes to establish and make effective pending the final decree in this cause. That the toll rates set forth in Exhibit "F" are the same as the toll rates set forth in Exhibit "B."

IX. That the Home Telephone and Telegraph Company of Spokane is a corporation organized and existing under and by virtue of the laws of the State of Washington, and is the owner of and operates the telephone system furnishing telephone service to the City of Spokane and the territory immediately adjacent thereto. That all of the capital stock of said Home Company of Spokane is owned by plaintiff and because of such stock ownership said Department, in considering plaintiff's application for increased rates, treated the Spokane Exchange as an exchange of plaintiff, and in arriving at the rate base for the State of Washington, included therein the property used and useful in furnishing telephone service to said City of Spokane and the territory immediately adjacent thereto. That the validity of the said order of said Department of March 31, 1923, as affecting the rates for telephone service in the said City of Spokane and territory immediately adjacent thereto, is the subject of a separate suit brought or about to be brought in this court by said The Home Telephone and Telegraph Company of Spokane.

X. The cost to plaintiff of its property in the State of Washington (not including Spokane, that being the property of said Home Company of Spokane as aforesaid, and land being included at present value), now being used or useful in furnishing its telephone and telegraph service to the public therein and exclusively devoted to the rendition of that service, was, as of the 31st day of December, 1922 the sum of $29,347,257. The cost to plaintiff of its property constituting its Seattle Exchange and now being used or useful in furnishing telephone service therein, was, as of the 31st day of December, 1922, the sum of $17,023,372, and the cost to plaintiff of its property constituting its Tacoma Exchange and used or useful in furnishing telephone service therein was, as of the 31st day of December, 1922, the sum of $2,888,021, the two cities named thus constituting sixty-eight per cent of plaintiff's property in the State of Washington. That the cost to plaintiff of its said property in the State of Washington, in the City of Seattle and in the City of Tacoma is now somewhat in excess of the amounts hereinbefore mentioned on account of the additions and betterments in the meantime made to said respective properties. That the cost to plaintiff of its property in the State of Washington and in the cities of Seattle and Tacoma is substantially the rate base fixed by the Department of Public Works in its said order of March 31, 1923, as of the 30th day of June, 1922, with additions and betterments thereto made since that time (excluding the Spokane Exchange from the rate base of the Department). The present cost of reproduction of said property

[fol. 5] as it existed on the 31st day of December, 1922, is the sum of $48,087,785 for the State of Washington (not including Spokane); the sum of $27,149,130 for the City of Seattle, and the sum of $4,998,964 for the City of Tacoma. That the cost of reproduction of said property less depreciation, as of the 31st day of December, 1922, is the sum of $43,962,085 for the State of Washington; the sum of $24,919,930 for the City of Seattle, and the sum of $4,534,264 for the City of Tacoma. The fair and reasonable value of said property for said state (not including Spokane) is the sum of $35,616,896; for said City of Seattle the sum of $20,852,067, and for said City of Tacoma the sum of $3,457,290, all as of the 31st day of December, 1922, the two cities named thus constituting sixty-eight per cent of the total fair value of plaintiff's property in the State of Washington.

The foregoing statements as to the cost to plaintiff of said respective properties include nothing on account of the item of franchises, or the item known as going concern value, but said latter item has been considered in determining the present cost of reproduction and the present fair and reasonable value of said property.

XI. The fair annual return which plaintiff is entitled to earn under rates imposed upon it by public authority is an amount equal to not less than eight per cent of the fair and reasonable value of its property used or useful in the rendition of the service covered by the rates in question.

XII. That the plaintiff's telephone business in the State of Washington has been conducted efficiently and economically during all of the times herein referred to. Plaintiff's net earnings derived from its telephone and telegraph business within the State of Washington stated in rate per cent annual return upon the cost of the property on the one hand and upon the fair value thereof, on the other, used or useful in furnishing said service and exclusively devoted to the rendition thereof during each of the periods stated, have been as follows:

	Cost	Fair value
Year 1919, State of Washington	4.97%	3.67%
Year 1919, City of Seattle	3.97%	2.66%
Year 1919, City of Tacoma	.98%	.81%
Year 1920, State of Washington	4.42%	3.33%
Year 1920, City of Seattle	1.85%	1.29%
Year 1920, City of Tacoma	.89%	.74%
Year 1921, State of Washington	3.30%	2.58%
Year 1921, City of Seattle	.69%	.52%
Year 1921, City of Tacoma	.58%	.48%
Year 1922, State of Washington	3.17%	2.58%
Year 1922, City of Seattle	.19%	.15%
Year 1922, City of Tacoma	.89%	.75%

(Spokane not included.)

[fol. 6] At all of the times aforesaid the fair and reasonable value of said property has been an amount substantially in excess of its cost.

XIII. That the rates of plaintiff in the State of Washington established and in force, as herein set forth, during the years 1919, 1920, 1921 and 1922, and which are in effect under the order of said Department of March 31, 1923, were and are not compensatory and were and are less than just and reasonable rates. That the amounts by which the net revenue derived by the plaintiff from its telephone and telegraph business in the State of Washington and in the cities of Seattle and Tacoma, were less than eight per cent of the cost of the property used or useful in each case in and exclusively devoted to the rendition of service within said state and for the said cities were for the

Year 1919, State of Washington	$537,242
Year 1919, City of Seattle	312,793
Year 1919, City of Tacoma	187,587
Year 1920, State of Washington	686,716
Year 1920, City of Seattle	535,352
Year 1920, City of Tacoma	193,050
Year 1921, State of Washington	1,058,984
Year 1921, City of Seattle	833,945
Year 1921, City of Tacoma	205,110
Year 1922, State of Washington	1,310,651
Year 1922, City of Seattle	1,192,580
Year 1922, City of Tacoma	202,121

(Spokane not included.)

XIV. That the maintenance of the rates and charges as aforesaid in Exhibit "A" under the order of said Department of March 31, 1923, compels the plaintiff to provide service at rates which are not compensatory and which are less than just and reasonable, and results in the confiscation of the property of plaintiff in the State of Washington and the cities of Seattle and Tacoma devoted to public use, and deprives plaintiff of its property without compensation and without due process of law and denies to it the equal protection of the laws, in violation of the Constitution of the United States, particularly Article Fifth and the Fourteenth Amendment thereof. That said order of March 31, 1923, is therefore null and void. That if said order of March 31, 1923, is enforced and plaintiff is compelled to charge the rates therein prescribed, and if plaintiff shall practice all reasonable economies consistent with adequate and efficient service to the public, the financial results will be as follows: Plaintiff will be prevented from earning any return in excess of 2.11 per cent per annum upon the fair and reasonable value of said property in said state, and .54 per cent loss per annum upon the fair and reasonable value of said property in said City of Seattle, and .56 per cent

per annum upon the fair and reasonable value of said property in [fol. 7] said City of Tacoma. That had the rates set forth in Exhibit "F," being the rates found by the Supervisor of Public Utilities in his dissenting order of March 31, 1923, to be just, fair, reasonable and sufficient, been in effect for the year 1923, the return to plaintiff thereunder on the fair value of its property would have been for the State of Washington 5.09 per cent; for the City of Seattle 2.81 per cent; for the City of Tacoma 3.96 per cent, and for the same period a return upon the cost of its property in the State of Washington, as found in said dissenting opinion, of 6.15 per cent; 3.42 per cent for the City of Seattle and 4.73 per cent for the city of Tacoma. And plaintiff avers that the rates and charges set forth in said Exhibit "F" are less than the just and reasonable rates and charges to which plaintiff is lawfully entitled, but plaintiff proposes to establish and put into effect said rates and charges pending the final decree in this cause.

XV. That the plaintiff has no adequate remedy at law, and should it fail to observe the rates and charges specified in said schedule Exhibit "A" and make and enforce the rates and charges as specified in Exhibit "F," or any rates or charges higher than those specified in said Exhibit "A," or any rates not sanctioned by the Department of Public Works of Washington, the defendants will, unless restrained by the order of this court, institute and cause to be instituted proceedings to compel compliance with said schedule Exhibit "A," and the plaintiff, its directors, officers, agents and employees, will be subjected to a multiplicity of suits and incur the penalties and punishments prescribed by the laws of the State of Washington, and may, under the provisions of said laws, be charged with the commission of gross misdemeanors, each punishable under the laws of Washington by a fine of $1,000, or imprisonment in a county jail of one year, or both.

That unless the defendants are restrained and enjoined as herein prayed, plaintiff, its directors, officers, agents and employees, will be deterred and prevented by the threat of numerous and excessive fines and of imprisonment as aforesaid, from putting into effect the said schedule of rates and charges in said Exhibit "F," or any rates and charges other than those provided in said Exhibit "A," and thereby plaintiff will be forced to submit to the confiscation of its property without due process of law and in violation of its rights under the Constitution of the United States, as hereinbefore alleged. That unless the defendants are restrained and enjoined, as herein prayed, plaintiff's subscribers and other patrons will be induced and caused to resist and refuse payment of any rates and charges other than those provided in said Exhibit "A." That because of the nature of the business of the plaintiff and the small sums of money generally due monthly from each of its subscribers and patrons, it is impracticable for plaintiff to enforce collection thereof by actions at law, and as a result thereof plaintiff's property will be confiscated as aforesaid. That plaintiff has no practical way to enforce and collect its rates and charges except by cutting off and refusing service for

default in payment of its bills rendered monthly therefor, and its [fol. 8] subscribers and patrons will, as plaintiff believes and so alleges, institute large numbers of suits in various jurisdictions throughout the State of Washington to restrain plaintiff from cutting off and denying service for such non-payment of bills and for damages, and plaintiff will thereby be subjected to an endless multiplicity of suits, and plaintiff's property will be confiscated, to plaintiff's irreparable loss and damage, all as hereinbefore alleged.

That large numbers of suits will be brought in the courts of the State of Washington by defendants and plaintiff's subscribers and patrons to restrain and enjoin plaintiff, its directors, officers, agents and employees, from putting into effect said schedule Exhibit "F," or any schedule other than said Exhibit "A," and to compel plaintiff to furnish telephone service for the unlawful and confiscatory rates provided in said schedule Exhibit "A." That the issues which will be presented in each said suit are presented and should and will be decided in this action.

Wherefor, the plaintiff prays the judgment and decree of this court:

First: That the rates and charges set forth in said schedule Exhibit "A" and prescribed by said Department of Public Works be decreed to be confiscatory, in violation of the Constitution of the United States and the said order of March 31, 1923, imposing the same to be void and of no effect;

Second. That defendants, and each of them, and all other persons, be temporarily and permanently restrained and enjoined from any attempt to compel the plaintiff, its officers, agents and employees, to observe, maintain or keep in force the rates, tariffs and charges now prescribed by said Department of Public Works, as set forth in said schedule Exhibit "A," filed herewith, or from any attempt to compel the plaintiff to continue to observe or maintain said rates or charges;

Third. That defendants, and each of them, and all other persons, be temporarily and permanently restrained and enjoined from any attempt to interfere with or prevent the plaintiff, its directors, officers, agents and employees, from immediately putting into effect said schedule Exhibit "F" and charging and collecting the rates and charges therein set forth until just and reasonable schedules of rates and charges are established according to law;

Fourth. That the defendants, and each of them, and all other persons, be temporarily and permanently restrained and enjoined from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees, to enforce any penalty or remedy against the plaintiff, its directors, officers, agents or employees, for disregarding said rates and charges Exhibit "A," or for putting into effect any schedule of rates and charges not in excess of those set forth in Exhibit "F";

[fol. 9] Fifth. That the plaintiff have such other and further relief as may be just and equitable in the premises.

May it please your Honors to grant unto the plaintiff a writ of subpœna of the United States of America issuing out of and under the seal of this Honorable Court directed to the said E. V. Kuykendall, Hance H. Cleland, Frank R. Spinning and John H. Dunbar commanding them, and each of them, on a day certain to be named, and under a certain penalty, to be and appear before this Honorable Court, then and there to answer, but not under oath (answer under oath being hereby expressly waived), all and singular the premises, and to perform and abide by such orders, direction or decree as may be made against them in the premises, and that pending the final hearing of this cause a temporary restraining order may be issued as above prayed.

And the plaintiff will ever pray.

The Pacific Telephone and Telegraph Company, By Otto B. Rupp, Post, Russell Higgins, Pillsbury, Madison & Sutro, Its Solicitors.

Jurat showing the foregoing was duly sworn to by G. E. McFarland omitted in printing.

EXHIBIT "A" TO BILL OF COMPLAINT

The Pacific Telephone and Telegraph Company

Exchange Rates—Seattle, Tacoma, Washington; Farmer Line Rates —Exchanges State of Washington; Toll Rates—State of Washington, Effective August 1, 1919.

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Two-party Line	...	...
Extension (with or without bell)	1.00	1.00
Suburban Service—Ten-party Line (See Section 3)	3.50	3.75

[fol. 10] Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	3.75	4.00
Two-party Line	3.00	3.25
Four-party Line	2.50	2.75
Extension (without bell)	.50	.75
Extension (with bell)	.65	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary Rate Area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: November 4, 1918. Effective: March 1, 1919.

Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$.04
Auxiliary Line	2.50	2.75	...	...
Extension (with or without bell)	.75	.75	...	...

Residence—Measured Service

Individual Line	...	...	...	...
Extension (without bell)	...	...	...	...
Extension (with bell)	...	...	...	...

Business—Coin Box Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$.15	*	3	$.05
*25c per month additional.				
Extension (with or without bell) per month	1.00	1.00	...	...

[fol. 11] Residence—Coin Box Service

Individual Line	...	...	...	...
Extension (without bell) per month....	...	...	...	...
Extension (with bell) per month	...	...	...	...

Issued: November 4, 1918. Effective: March 1, 1919.
Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Tacoma, Pierce County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line.....	$7.00	$7.25
Two-party Line	6.00	6.25
Extension (with or without bell).....	1.00	1.00
Suburban Service—Ten-party Line (See Section 3)	3.50	3.75

Residence—Unlimited Service

Individual Line	3.00	3.25
Two-party Line	2.50	2.75
Four-party Line	2.00	2.25
Extension (without bell).....	.50	.75
Extension (with bell).....	.65	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary Rate Area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: November 4, 1918. Effective: March 1, 1919.

Cancels and supersedes Exhange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

[fol. 12] W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Tacoma, Pierce County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$...	$...	...	$...
Auxiliary Line	...	...	...	...
Extension (with or without bell)	...	...	...	...

Residence—Measured Service

Individual Line	...	...	...	...
Extension (without bell)	...	...	...	...
Extension (with bell)..	...	...	...	...

Business—Coin Box Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$.15	*	3	$.05
*25c per month addition.				
Extension (with or without bell) per month)	1.00	1.00	...	...

Residence—Coin Box Service

Individual Line	...	...	...	...
Extension (without bell) per month)...	...	...	...	...
Extension (with bell) per month	...	...	...	...

Issued: November 4, 1918. Effective: March 1, 1919.
Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.
P. H. Coolidge, General Commercial Superintendent.

[fol. 13] W. P. S. C. No. 2, Section 2

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Unlimited Service

	Rate per month
Switchboard, with battery power, ringing circuit and switchboard telephone for each position, equipped for 15 lines..	$2.00
Additional switchboard equipment for each group of 5 lines or less	.20

First bothway trunk line—Individual business rate plus $2.00 per month.
Each additional bothway trunk line—Rate for first bothway trunk line less 25%.
Each incoming trunk line—Individual business rate less 20%, minimum $4.00 per month.

	Wall set	Desk set
Each Station, primary or extension, not in guest rooms (See Mileage Rates, Sec. 3)	$1.00	$1.00
Each Station, primary or extension, in guest rooms:		
1 to 10 inclusive	.50	.75
11 to 20 inclusive	.45	.70
21 to 35 inclusive	.40	.65
36 to 50 inclusive	.35	.60
Over 50	.25	.50

Minimum installation: Two (2) trunk lines and ten (10) stations excluding switchboard telephone.
The switchboard is furnished in any standard size to meet the subscriber's requirements.
Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.
Issued: November 4, 1918. Effective: March 1, 1919.
Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.
P. H. Coolidge, General Commercial Superintendent

[fol. 14] W. P. S. C. No. 2, Section 2

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Measured Service

	Rate per month
Switchboard with battery power, ringing circuit and switchboard telephone for each position	None.
Trunk Lines—Bothway only	None.

(Enough bothway trunk lines will be provided to properly handle the traffic.)

Each exchange message	$.025

	Wall set	Desk set
Each Station, primary or extension, not in guest rooms (See Mileage Rates, Sec. 3)	$1.00	$1.00
Each Station, primary or extension, in guest rooms:		
1 to 10 inclusive	.50	.75
11 to 20 inclusive	.45	.70
21 to 35 inclusive	.40	.65
36 to 50 inclusive	.35	.60
Over 50	.25	.50

Minimum installations: Ten (10) stations, excluding switchboard telephones.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: September 1, 1916. Effective: September 1, 1916.*

Cancels and supersedes Exchange Rate Schedule effective January 1, 1912.

*In accordance with Order No. 1825 of the Public Service Commission of Washington.

P. H. Coolidge, General Commercial Superintendent.

[fol. 15] W. P. S. C. No. 2, Section 3

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Farmer Line Service

Total number of stations	Rate per year
300 stations or less	$3.00
300 to 500 stations	3.60
500 to 750 stations	4.20
750 to 1000 stations	5.40
1000 to 2000 stations	7.20
2000 to 4000 stations	8.40
4000 to 6000 stations	9.60
6000 to 8000 stations	10.80
8000 to 12000 stations	12.00
12000 stations and over	15.00

Company Furnishes.—For not less than 5 subscribers per circuit, switchboard, and facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, Company furnishes facilities to city or town limits. Central Office Service. Listing in Directory. Code Ring Card.

Subscriber Furnishes.—Facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, subscriber furnishes facilities to city or town limits. Complete telephone and battery, substation protection. Maintenance of above.

Subscriber will be allowed a discount of Ten Per Cent (10%) on the charge for exchange service, if bill is paid at the Company's office during the first month of the year. New subscribers will be billed from the date of connection to the end of the year, and annually in advance thereafter. Initial bills rendered new subscribers will be subject to a Ten Per Cent (10%) discount on the charge for exchange service, provided the bill is paid at the Company's office within thirty days after date of bill.

Farmer Line stations shall not be located within the Primary Rate Area.

Issued: September 1, 1916. Effective: September 1, 1916.*

Cancels and supersedes Exchange Rate Schedule effective May 14, 1915.

*In accordance with Order No. 1825 of the Public Service Commission of Washington.

P. H. Coolidge, General Commercial Superintendent.

[fol. 16] Telegraph and Telephone Service Bulletin No. 22

Order No. 2495

December 13, 1918.

There are many counties and districts in which a free toll service is granted the subscriber within such county or district, the exchange rate presumably having been made with a view of such free toll service. This Order shall not be construed as requiring a discontinuance of these privileges pending a study and revision of these exchange rates.

Nothing in this Order establishing toll rates shall be construed as changing rates made without reference to mileage now established for service within a certain county or other area when such rates are not in excess of ten cents, but no further rates of this character shall be established without specific approval of the Postmaster General.

In competitive situations where the earning value of a property under Federal control would be unfavorably affected by the establishment of rates and charges herein ordered, an exception may be made by filing with the Postmaster General a statement to that effect with a proposal of modification from ordered rates and such modifications may go in to effect unless vetoed or otherwise ordered by the Postmaster General within thirty days and during such thirty days existing rates may be continued.

I. Classification of Toll Telephone Service

The following classes of telephone toll message service shall be established effective at 12:01 A. M. January 21st, 1919.

1. Station-to-station Messages:

This service shall be defined by the following conditions:

(a) Orders for Station-to-Station service shall specify the telephone station called, either by telephone number, or by the name of the subscriber of the called station.

(b) Under this classification, orders will not be accepted to establish communication between particular persons.

(c) The measurement of the duration of a Station-to-Station message for the purposes of the application of rates shall begin at the moment when telephonic communication is established between the called and the calling stations. The term "station" for the purpose of this clause is defined to include a private branch exchange switchboard operator, in those cases where private branch exchange systems are involved in Station-to-Station service.

(d) Station-to-Station service may be operated as a Number Service, in which case the called station may be designated only by number, through A and B Switchboards or through tandem operator, etc.; or it may be operated through toll switchboard, and technically

known as an "A Y" service, depending on the local circumstances, [fol. 17] operating conditions, plant conditions, and the circumstances as to directory distribution and as to areas; and the more economical method will be employed in each case. The choice of method of operating Station-to-Station service will be determined solely as an operating arrangement not in any way affecting rates or service; except that where the Number method is employed it is required that order be accepted stating only the telephone number of the called station.

(c) The charges for Station-to-Station messages shall not be "reversed," i. e., collected at the called station.

2. Person-to-person Calls:

This service shall be defined by the following conditions:

(a) Orders will be accepted to establish communication between specified persons.

(b) The measurement of the duration of the Person-to-Person message for the purpose of the application of rates shall begin at the moment when communication begins with or between the particular person or persons specified in the order; provided that certain Report charges will be made under the conditions specified in the clause next below, where communication may not be established.

(c) Orders from Person-to-Person service are accepted only under the condition that a limited charge (to be known as "Report Charge") will be made in the following cases where it is impossible to establish communication between particular persons:

First. When the order is to establish communication with a particular person in a given city, telephone address unknown, and the particular person cannot be secured within one hour (exclusive of any time during which "no circuit" or other cause prevents communication of the order to the distant city or exchange, or its completion.)

Second. When the designated person called refuses to talk.

Third. When the report is returned that the designated person called is "out" or "out and will return at (specified) time)" or "out and time of return unknown," "is absent from the city," and similar report advising the calling subscriber of the facts ascertained when failure to complete the order is due solely to the circumstances of the called person or to fault in describing the location of the called person, and when all of the work preliminary to establishing communication with the called person is done.

Fourth. When communication between the designated persons cannot be established because the designated person at the calling station is absent at the calling station; provided, that no charge shall be made in such cases where the delay, if any, in establishing connection is greater than one hour.

[fol. 18] Fifth. When the designated person at the calling station refuses to talk when the facilities for communication have been established.

3. Appointment Calls:

Appointment calls are Person-to-Person calls, the order for which provides that communication is to be arranged for to take place at a specified time.

4. Messenger Calls:

Messenger calls are Person-to-Person calls requiring the use of a messenger to secure attendance of a designated person at one of the public pay stations at the distant point.

5. Collect Calls:

Collect calls are Person-to-Person calls, charges for which are "reversed," i. e., to be collected from the subscriber of the distant station at which the call is to be completed.

II. Standard Toll Rates for Station-to-station Messages

Effective 12:01 A. M., January 21, 1919, following initial period rates are made standard throughout the United States for Station-to-Station toll messages where the distance between the exchanges, or toll points, does not exceed 40 miles by direct air line measurement:

For distances more than	But not more than	Initial rate is
0 Miles	6 Miles	$0.05
6 "	12 "	.10
12 "	18 "	.15
18 "	24 "	.20
24 "	32 "	.25
32 "	40 "	.30

The following initial period rates are made standard for Station-to-Station toll messages for all distances in excess of 40 miles by direct air measurement:

For distances more than	But not more than	Initial rate is
40 Miles	48 Miles	$0.35
48 "	56 "	40

For each additional 8 miles or fraction thereof, 5 cents additional. For the purpose of applying standard rates where the direct air line distance between points is in excess of 40 miles, distance shall be determined as the air line distance between the center of blocks seven miles square, within which the points of communication are located, and where the distance is in excess of 350 miles by the air distance [fol. 19] between the centers of section 35 miles square.

The block and section scaling system for purposes of measuring toll rate distance between points more than 40 miles distant by direct measurement, shall consist of a grid containing sections 35 miles

square, each section subdivided into 25 blocks 7 miles square, so placed on a polyconic projection of a Government Survey map of the United States that section lines coincide with a line drawn approximately north and south through the center of the United States and with a line at right angles thereto passing through the northwestern point of the international boundary line in the Straight of Georgia.

III. Standard Toll Rates for Other Classes of Toll Calls

Effective 12:01 A. M., January 21, 1919, the following toll message rates are established for Person-to-Person calls, Appointment calls and Messenger calls:

1. The initial period rate for Person-to-Person Calls shall be approximately 25 per cent in addition to the Station-to-Station rate between the same points, in ac-ordance with the schedule of computed rates for person-to-person, appointment and messenger toll calls, attached hereto, and hereby made a part of this order; but no Person-to-Person rate shall be less than 20 cents.

2. In those cases where Person-to-Person calls are not computed and a report is made or the conditions are such as described in paraparagraph I, 2 (c) of this Order, a Report Charge shall be made of approximately one-fourth of the initial rate for Station-to-Station messages between the same points, in accordance with these schedules of computed rates for Person-to-Person, appointment and messenger toll calls, attached hereto and hereby made a part of this Order; but no Report Charge shall be less than 10 cents for any one call, nor more than $2.00.

3. The rates for Appointment Calls shall be approximately 50 per cent in addition to the rate for Station-to-Station messages between the same points in accordance with the schedule of computed rates for Person-to-Person, appointment and messenger toll calls, hereto attached and hereby made a part of this order; but in the case of any Appointment Call order, where the distant station is reached, whether the appointment be made or not, the Report Charge applicable in case of Person-to-Person Calls between the same points shall be made. No Appointment Calls shall be accepted where the Station-to-Station rate is less than 15 cents.

4. The rates for Messenger Calls shall be the same as applied to Appointment Calls between the same points plus any charges that may be required for the service of messenger. No messenger Calls shall be accepted where the Station-to-Station rate is less than 15 cents.

[fol. 20] IV. Standard Toll Night Rates

Effective 12:01 A. M., January 21, 1919, the following reductions shall be made in the rate and charges for Station-to-Station messages only, between the hours of 8:30 P. M. and 4:30 A. M.

1. Between the hours of 8:30 P. M. and 12:00 Midnight, the Night Rate for Station-to-Station messages shall be approximately

50 per cent less than the regular Day Rate, in accordance with the schedule of computed night rates, attached hereto and hereby made a part of this Order; but no Night Rate shall be less than 25 cents.

2. Between the hours of 12:00 Midnight and 4:30 A. M., the Night Rates shall be approximately 75 per cent less than the established Day Rate, in accordance with the schedule of computed night rates attached hereto, and hereby made a part of this Order; but no Night Rate shall be less than 25 cents.

3. For the purpose of applying Night Rates, the time of day at the point at which a Station-to-Station message originates shall be used.

4. Day rate only shall be employed between the hours of 4:30 A. M. and 8:30 P. M.

V. Standard Initial Period, Overtime Period, and Overtime Rate

Effective 12:01 A. M., January 21, 1919, the following initial period, overtime period and overtime rates are made standard in connection with all toll calls and messages made at standard initial toll rates:

1. Standard Initial Period and Overtime Period:

Where the initial rate is	The initial period is	The overtime period is
$0.05	5 Minutes	5 Minutes
.10	5 Minutes	3 Minutes
.15	5 Minutes	2 Minutes
.20	5 Minutes	2 Minutes
.25	5 Minutes	1 Minute
.30	3 Minutes	1 Minute
.35	3 Minutes	1 Minute
All other rates	3 Minutes	1 Minute

Where Person-to-Person calls are accepted at the above Initial Rate, the initial period is 3 minutes and the overtime period is 1 minute.

[fol. 21] 2. Standard Overtime Rates are as Follows:

Where the initial rate is	The overtime rate is
$0.05	$0.05
.10	.05
.15	.05
.20	.05
.25	.05
.30	.10
.35	.10

and thereafter approximately one-third of the initial rate, and in no case more than one-third of the initial rate, in accordance with the table of computed overtime charges hereto attached and hereby made a part of this order. A. S. Burleson, Postmaster General.

[fol. 22] Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls

Where the station-to-station day rate is	The completed person-to-person rate is	The completed appointment and messenger rate is	The report charge is
$.05	Not Quoted	Not Quoted	Not Quoted
.10	Not Quoted	Not Quoted	Not Quoted
.15	.20	.25	.10
.20	.25	.30	.10
.25	.30	.35	.10
.30	.40	.45	.10
.35	.45	.50	.10
.40	.50	.60	.10
.45	.55	.65	.15
.50	.60	.75	.15
.55	.65	.80	.15
.60	.75	.90	.15
.65	.80	.95	.20
.70	.85	1.05	.20
.75	.90	1.10	.20
.80	1.00	1.20	.20
.85	1.05	1.25	.25
.90	1.10	1.35	.25
.95	1.15	1.40	.25
1.00	1.25	1.50	.25
1.05	1.30	1.55	.30
1.10	1.35	1.65	.30
1.15	1.40	1.70	.30
1.20	1.50	1.80	.30
1.25	1.55	1.85	.35
1.30	1.60	1.95	.35
1.35	1.65	2.00	.35
1.40	1.75	2.10	.35
1.45	1.80	2.15	.40
1.50	1.85	2.25	.40
1.55	1.90	2.30	.40
1.60	2.00	2.40	.40
1.65	2.05	2.45	.45
1.70	2.10	2.55	.45
1.75	2.15	2.60	.45
1.80	2.25	2.70	.45
1.85	2.30	2.75	.50
1.90	2.35	2.85	.50
1.95	2.40	2.90	.50
2.00	2.50	3.00	.50
And thereafter increasing in 5 cent steps.	And thereafter 25% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, 25% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter 50% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 2, 50% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter one - fourth Station - to - Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, one-fourth the Station-to-Station day rate computed to the next higher multiple of 5 cents; but no Report Charge will exceed 2.00.

[fol. 23] Schedule of Computed Night Rates for Station to-station Toll Massages

When the day rate is	The rate between 8:30 p. m. and 12:00 midnight is	The rate between 12 midnight and 4:30 a. m. is
$.05	Day Rate	Day Rate
.10	Day Rate	Day Rate
.15	Day Rate	Day Rate
.20	Day Rate	Day Rate
.25	Day Rate	Day Rate
.30	.25	.25
.35	.25	.25
.40	.25	.25
.45	.25	.25
.50	.25	.25
.55	.30	.25
.60	.30	.25
.65	.35	.25
.70	.35	.25
.75	.40	.25
.80	.40	.25
.85	.45	.25
.90	.45	.25
.95	.50	.25
1.00	.50	.25
1.05	.55	.30
1.10	.55	.30
1.15	.60	.30
1.20	.60	.30
1.25	.65	.35
1.30	.65	.35
1.35	.70	.35
1.40	.70	.35
1.45	.75	.40
1.50	.75	.40
1.55	.80	.40
1.60	.80	.40
1.65	.85	.45
1.70	.85	.45
1.75	.90	.45
1.80	.90	.45
1.85	.95	.50
1.90	.95	.50
1.95	1.00	.50
2.00	1.00	.50
And thereafter increasing in 5 cent steps.	And thereafter one-half the day rate. When the day rate is not evenly divisible by 2, one-half the day rate computed to the next higher multiple of 5 cents.	And thereafter one-fourth the day rate. When the day rate is not evenly divisible by 4, one-fourth the day rate, computed to the next higher multiple of 5 cents.

[fol. 24]

Where the initial rate is	The initial period is	Overtime rate is	The computed charges are for						
			4 min.	5 min.	6 min.	7 min.	8 min.	9 min.	10 min.
$.05	5 Min.	$.05	$.05	$.05	$.10	$.10	$.10	$.10	$.10
.10	5 Min.	.05	.10	.10	.15	.15	.15	.20	.20
.15	5 Min.	.05	.15	.15	.20	.20	.25	.25	.30
.20*	5 Min.	.05	.20	.20	.20	.25	.30	.30	.35
.25*	5 Min.	.05	.25	.25	.30	.35	.40	.45	.50
.30	3 Min.	.10	.40	.50	.60	.70	.80	.90	1.00
.35	3 Min.	.10	.45	.55	.65	.75	.85	.85	1.05
.40	3 Min.	.10	.50	.60	.70	.80	.90	1.00	1.00
.45	3 Min.	.15	.60	.75	.90	1.05	1.20	1.35	1.50
.50	3 Min.	.15	.65	.80	.95	1.10	1.25	1.40	1.55
.55	3 Min.	.15	.70	.85	1.00	1.15	1.30	1.45	1.60
.60	3 Min.	.20	.80	1.00	1.20	1.40	1.60	1.80	2.00
.65	3 Min.	.20	.85	1.05	1.25	1.45	1.65	1.85	2.05
.70	3 Min.	.20	.90	1.10	1.30	1.50	1.70	1.90	2.10
.75	3 Min.	.25	1.00	1.25	1.50	1.75	2.00	2.25	2.50
.80	3 Min.	.25	1.05	1.30	1.55	1.80	2.05	2.30	2.55
.85	3 Min.	.25	1.10	1.35	1.60	1.85	2.10	2.35	2.60
.90	3 Min.	.30	1.20	1.50	1.80	2.10	2.40	2.70	3.00
.95	3 Min.	.30	1.25	1.55	1.85	2.15	2.45	2.75	3.05
Add 1.00	3 Min.	.30	1.30	1.60	1.90	2.20	2.50	2.80	3.10
thereafter increasing in 5 cent steps.	And thereafter 3 minutes for all rates.	And thereafter one-third the initial rate to the nearest multiple of 5 cents, but not more than one-third the initial rate.	And thereafter in accordance with the above applied system of computation, for each higher rate and each additional overtime period or fraction thereof.						

*Where person-to-person calls are accepted at these rates the initial period is 3 minutes and the overtime period is one minute.

[fol. 25] Telegraph and Telephone Service

Order No. 2797

February 17, 1919.

Order No. 2495 issued by me on December 13th, 1918, provided certain charges for classes of telephone toll service to be effective January 21, 1919.

1. To meet public demand for particular person, messenger and appointment calls on short haul toll messages and which in the interest of the public service it is desirable to furnish, the following schedule will become effective February 21, 1919, by all companies furnishing telephone toll service to the public:

For distance of twelve miles or less, station-to-station rate is 10 cents.

The completed person-to-person rate is 15 cents.

Completed appointment and messenger rate is 20 cents.

The report charge is 5 cents.

The initial period for person-to-person messages at an initial rate of 15 cents will be three minutes and the overtime rate will be 5 cents for each additional minute.

In the case of those routes where the companies prior to January 21, 1919, provided station-to-station or two-number service exclusively, this practice shall be continued hereafter where the distance is 12 miles or less, at the rates prescribed and under the conditions in Order No. 2495. In the case of those routes where there were in effect prior to January 21, 1919, station-to-station or two-number rates of 5 cents for distances not to exceed 6 miles the rate of 5 cents shall be continued.

2. In cases where it has been and is impracticable or impossible to build direct toll lines between communities on account of natural barriers such as mountains, waterways, and so forth, or in other extraordinary or exceptional cases, the operating board is authorized to suspend in part or entirely Order No. 2495, and to restore in whole or in part, the rates in effect immediately prior to January 21, 1919. Where such suspensions are made, the operating board shall make report of each case to me and such suspensions shall continue in effect until otherwise ordered by the operating board or the Postmaster General.

3. Nothing in Order No. 2495 or this bulletin shall be construed as affecting arrangements or basis of settlements between connecting companies in effect on January 20, 1919.

A. S. Burleson, Postmaster General.

[fol. 26] EXHIBIT "B" TO BILL OF COMPLAINT

The Pacific Telephone and Telegraph Company

Toll Rate Schedule Filed October 5, 1922

State of Washington

The Pacific Telephone and Telegraph Company State of Washington Inter-Exchange Rates for Intrastate Telephone Toll Messages

I. Classification of Intrastate Toll Telephone Service

The following classes of telephone toll message service shall be furnished effective 12:01 A. M. —— 21, 1922:

1. Station-to-station Messages.—This service shall be defined by the following conditions:

(a) Orders for station-to-station service shall specify the telephone station called, either by telephone number, or by the name of the subscriber of the called station.

(b) Under this classification, orders will not be accepted to establish communication between particular persons.

(c) The measurement of the duration of a station-to-station message for purposes of the application of rates shall begin at the moment when telephonic communication is established between the called and the calling stations. The term "station" for the purpose of this clause is defined to include a private branch exchange switchboard operator, in those cases where private branch exchange systems are involved in station-to-station service.

(d) Station-to-station service may be operated as a Number Service, in which case the called station may be designated only by number, through A and B switchboards, or through tandem operators, etc., or it may be operated through toll switchboards, and technically known as an "AY" service, depending on the local circumstances as to operating conditions, plant conditions, and the circumstances as to directory distribution and areas; and the more economical method will be employed in each case. The choice of method of operating station-to-station service will be determined solely as an operating arrangement, not in any way affecting rates or service; except that where the number method is employed orders will be accepted stating only the telephone number of the called station.

(e) The charges for station-to-station messages shall not be "reversed," i. e., collected at the called station.

2. Person-to-person Calls.—This service shall be defined by the following conditions:

[fol. 27] (a) Orders will be accepted to establish communication between specified persons.

(b) The measurement of the duration of a person-to-person message for the purpose of the application of rates shall begin at the moment when communication begins with or between the particular person or persons specified in the order; provided that certain report charges will be made under the conditions specified in the clause next below, where communication may not be established.

(c) Orders for person-to-person service shall be accepted only under the condition that a limited charge (to be known as "Report Charge") will be made in the following cases where it is impossible to establish communication between particular persons:

(1) When the order is to establish communication with a particular person in a given city, telephone address unknown, and the particular person can not be secured within one hour (exclusive of any time during which "no circuits" or other cause prevent communication of the order to the distant city or exchange, or its completion.)

(2) When the designated person called refuses to talk.

(3) When the report is returned that the designated person called is "out" or "out and will return at (specified time)" or "out and time of return unknown," "is absent from the city," and similar reports advising the calling subscriber of the facts ascertained when failure to complete the order is due solely to the circumstances of the called person or to fault in describing the location of the called person, and when all of the work preliminary to establishing communication with the called person is done.

(4) When communication between the designated persons can not be established because the designated person at the calling station is absent at the calling station; provided that no charge shall be made in such cases where the delay, if any, in establishing connection is greater than one hour.

(5) When the designated person at the calling station refuses to talk when the facilities for communication have been established.

3. Appointment Calls.—Appointment calls are person-to-person calls, the order for which provides that communication is to be arranged for to take place at a specified time.

4. Messenger Calls.—Messenger calls are person-to-person calls requiring the use of a messenger to secure attendance of a designated person at one of the public pay stations at the distant point.

5. Collect Calls.—Collect calls are person-to-person calls, the charges for which are "reversed," i. e., to be collected from the subscriber of the distant station at which the call is to be completed.

[fol. 28] II. Toll Rates for Intrastate Station-to-station Messages

Effective 12:01 A. M., ——21, 1922, the following initial period rates are established for toll messages where the distance between exchanges, or toll points, does not exceed 40 miles by direct measurement on a U. S. Government Post Route Map.

For distances more than	But not more than	Initial rate
0 Miles	12 Miles	$0.10
12 "	18 "	.15
18 "	24 "	.20
24 "	32 "	.25
32 "	40 "	.30

The following initial period rates are established for station-to-station toll messages for all distances in excess of 40 miles by direct air line measurement:

For distances more than	But not more than	Initial rate
40 Miles	48 Miles	$0.35
48 "	56 "	.40

For each additional 8 miles or fraction thereof, 5 cents additional.

For the purpose of applying standard rates where the direct air line distance between points is in excess of 40 miles, distance shall be determined as the air line distance between the centers of blocks 7 miles square, within which the points of communication are located, and where the distance is in excess of 350 miles by the air line distance between the centers of sections 35 miles square.

The block and section scaling system for purposes of measuring toll rate distance between points more than 40 miles distant by direct measurement, shall consist of a grid containing sections 35 miles square, each section subdivided into 25 blocks seven miles square, so placed on a polyconic projection of a Government survey map of the United States that section lines coincide with a line drawn approximately north and south through the center of the United States and with a line at right angles thereto passing through the northwestern point of the International boundary line in the Straight of Georgia.

III. Toll Rates for Other Classes of Toll Calls

Effective 12:01 A. M., —— 21, 1922, the following toll message rates are established for person-to-person calls, appointment calls, and messenger calls:

1. The initial period rates for person-to-person calls shall be approximately 25 per cent in addition to the station-to-station rates

[fol. 29] between the same points, in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls, attached hereto, but no person-to-person rate shall be less than 15 cents.

2. In those cases where person-to-person calls are not completed and a report is made or the conditions are such as described in paragraph I, 2 (c) of this schedule a report charge shall be made of approximately one-fourth the initial rate for station-to-station messages between the same points, in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls, attached hereto and hereby made a part of this schedule; but no report charge shall be less than 5 cents for any one call, nor more than $2.00.

3. The rates for appointment calls shall be approximately 50 per cent in addition to the rates for station-to-station messages between the same points in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Call, hereto attached and hereby made a part of this schedule; but in the case of an appointment call order, where the distant station is reached, whether the appointment be made or not, the Report Charge applicable in case of person-to-person calls between the same points shall be made.

4. The rates for messenger calls shall be the same as applied to appointment calls, between the same points, plus any charges that may be required for the service of messengers.

IV. Standard Toll Night Rates

Effective 12:01 A. M., —— 21, 1922, the following reductions shall be effective in the rates and charges for station-to-station messages only, between the hours of 8:30 P. M. and 4:30 A. M.

1. Between the hours of 8:30 P. M. and 12 midnight, the night rates for station-to-station messages shall be approximately 50 per cent less than the regular day rates, in accordance with the Schedule of Computed Night Rates attached hereto and hereby made a part of this schedule, but no night rate shall be less than 25 cents.

2. Between the hours of 12 midnight and 4:30 A. M., the night rates shall be approximately 75 per cent less than the established day rates, in accordance with the Schedule of Computed Night Rates attached hereto, and hereby made a part of this schedule; but no night rate shall be less than 25 cents.

3. For the purpose of applying night rates, the time of day at the point at which a station-to-station message originates shall be used.

4. Day rates only shall be employed between the hours of 4:30 A. M. and 8:30 P. M.

[fol. 30] V. Initial Periods, Overtime Periods, and Overtime Rates

Effective 12:01 A. M., —— 21, 1922, the following initial periods, overtime periods and overtime rates are established:

Classification, Initial Period, Overtime Period

Station-Station	3 Minutes	1 Minute
Person-Person	2 Minutes	1 Minute
Messenger and appointment	2 Minutes	1 Minute

The Overtime rates shall be—

Station-to-station:

Where the initial rate is	Overtime rate per period
$0.10	$0.05
.15	.05
.20	.05
.25	.05
.30	.10
.35	.10
.40	.10
.45	.15

and thereafter approximately one-third of initial rate and in no case more than one-third of the initial rate.

Person-to-person and Messenger and Appointment

Where the initial rate is	Overtime rate per period
*$0.15	$0.05
.20	.10
.25	.10
.30	.15
.35	.15
.40	.20
.45	.20

and thereafter approximately one-half of the initial rate and in no case more than one-half of the initial rate.

*Minimum Messenger and Appointment Rate 20 cents.

[fol. 31] Schedule of Computed Night Rates for Station-to-station Toll Messages

When the day rate is	The rate between 8:30 p. m. and 12:00 midnight is	The rate between 12 midnight and 4:30 a. m. is
$.10	Day Rate	Day Rate
.15	Day Rate	Day Rate
.20	Day Rate	Day Rate
.25	Day Rate	Day Rate
.30	.25	.25
.35	.25	.25
.40	.25	.25
.45	.25	.25
.50	.25	.25
.55	.30	.25
.60	.30	.25
.65	.35	.25
.70	.35	.25
.75	.40	.25
.80	.40	.25
.85	.45	.25
.90	.45	.25
.95	.50	.25
1.00	.50	.25
1.05	.55	.30
1.10	.55	.30
1.15	.60	.30
1.20	.60	.30
1.25	.65	.35
1.30	.65	.35
1.35	.70	.35
1.40	.70	.35
1.45	.75	.40
1.50	.75	.40
1.55	.80	.40
1.60	.80	.40
1.65	.85	.45
1.70	.85	.45
1.75	.90	.45
1.80	.90	.45
1.85	.95	.50
1.90	.95	.50
1.95	1.00	.50
2.00	1.00	.50
And thereafter increasing in 5 cent steps.	And therafter one-half the day rate. When the day rate is not evenly divisible by 2, one-half the day rate computed to the next higher multiple of 5 cents.	And thereafter one-fourth the day rate. When the day rate is not evenly divisible by 4, one-fourth the day rate, computed to the next higher multiple of 5 cents.

[fol. 32] Schedule of Computed Rates for Person-to-person, Appointment, and Messenger Toll Calls

When the station-to-station day rate is	The completed person-to-person rate is	The completed appointment and messenger rate is	The report charge is
$0.10	$0.15	$0.20	$0.05
.15	.20	.25	.10
.20	.25	.30	.10
.25	.30	.35	.10
.30	.40	.45	.10
.35	.45	.50	.10
.40	.50	.60	.10
.45	.55	.65	.15
.50	.60	.75	.15
.55	.65	.80	.15
.60	.75	.90	.15
.65	.80	.95	.20
.70	.85	1.05	.20
.75	.90	1.10	.20
.80	1.00	1.20	.20
.85	1.05	1.25	.25
.90	1.10	1.35	.25
.95	1.15	1.40	.25
1.00	1.25	1.50	.25
1.05	1.30	1.55	.30
1.10	1.35	1.65	.30
1.15	1.40	1.70	.30
1.20	1.50	1.80	.30
1.25	1.55	1.85	.35
1.30	1.60	1.95	.35
1.35	1.65	2.00	.35
1.40	1.75	2.10	.35
1.45	1.80	2.15	.40
1.50	1.85	2.25	.40
1.55	1.90	2.30	.40
1.60	2.00	2.40	.40
1.65	2.05	2.45	.45
1.70	2.10	2.55	.45
1.75	2.15	2.60	.45
1.80	2.25	2.70	.45
1.85	2.30	2.75	.50
1.90	2.35	2.85	.50
1.95	2.40	2.90	.50
2.00	2.50	3.00	.50
And thereafter increasing in 5 cent steps.	And thereafter 25% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, 25% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter 50% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 2, , 50% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter one-fourth the Station-toStation day rate. When the Station - to - Station day rate is not evenly divisible by 4, one-fourth the Station - to - Station day rate computed to the next higher multiple of 5 cents; but no Report Charge will exceed $2.00.

[fol. 33] EXHIBIT C TO BILL OF COMPLAINT

The Pacific Telephone and Telegraph Company

Exchange Rates—Seattle-Tacoma. Washington—Filed September 20, 1922, and Not Withdrawn

W. D. P. W. No. 3, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$12.00	$12.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line (See Section 3)	3.50	3.75

Business Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$.05
Extension (with or without bell)	.75	1.00	...	....

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.25	$ *.	$.05
*25c per month additional.			
Extension (with or without bell) per month	1.00	1.25	....

[fol. 34] Residence—Unlimited Service

	Rate per month	
	Wall set	Desk Set
Individual Line	$4.75	$5.00
Two-party Line	4.00	4.25
Four-party Line	3.25	3.50
Extension (with or without bell)	.75	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary rate area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Farmer Line Service (See Section 3), each station, $15.00 per year.

Issued: October 2, 1922. Effective: November 1, 1922.

Cancels and supersedes Exchange Rate Schedule effective March 1, 1919.

P. H. Coolidge, General Commercial Superintendent.

W. D. P. W. No. 3, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Tacoma, Pierce County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.00	$10.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line (See Section 3)	3.50	3.75

Business Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	....

[fol. 35] Semi-public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line ..... *25c per month additional.	$.20	$ *.	$.05
Extension (with or without bell) per month	1.00	1.25	....

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.00	$4.25
Two-party Line	3.25	3.50
Four-party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary rate area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Farmer Line Service (See Section 3), each station $15.00 per year.

Issued: October 2, 1922. Effective: November 1, 1922.

Cancels and supersedes Exchange Rate Schedule effective March 1, 1919.

P. H. Coolidge, General Commercial Superintendent.

W. D. P. W. No. 3, Section 2

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Semi-public

Private Branch Exchange Service

Hotels desiring intercommunication between guest rooms stations and management stations and exterior service for both guest room and management stations shall be furnished semi-public private branch exchange service subject to the following conditions:

(a) The hotel proprietor is required to become and act as the telephone company's agent in furnishing and selling telephone service to guests.

[fol. 36] (b) The hotel agreeing:

(1) To charge the authorized rates for all telephone service rendered to guests and patrons.

(2) To collect for the telephone company at the established rates for exchange and interexchange service the charges incurred by patrons and guests and to remit such charges to the telephone company.

(3) To maintain service at proper standards.

(4) To furnish all operating at the private branch exchange switchboard for the transmission supervision and recording of messages sent to the central office from the private branch exchange system.

(c) The telephone company agreeing:

(1) To furnish facilities and exchange service in accordance with the following schedules, and interexchange service at published rates.

(2) To pay the hotel a commission on exchange and interexchange messages originating at guest room and lobby stations and charged to the hotel.

Switchboard with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless type	$3.00
Non-Multiple cord type:	
10 lines or less in use	5.00
11— 30 lines in use	6.00
31— 60 lines in use	7.00
61—100 lines in use	8.00
101—150 lines in use	9.00
151—200 lines in use	10.00
201—260 lines in use	11.00
261—320 lines in use	13.00

Multiple cord type:

Each position with not to exceed one multiple jack per line 15.00

Each additional strip of ten multiple jacks or portion thereof ..... .30

(a) Stations in hotel office and other locations on premises in which switchboard is located for the exclusive use of the hotel management:

Each station, without dial—Wall Set..... 1.00
Desk Set..... 1.25

Each Station, with dial—Wall Set..... 1.25
Desk Set..... 1.50

Stations outside premises in which switchboard is located, See Mileage Rates—Sec. 3.

[fol. 37] (b) Stations in guest rooms and lobby:

Each station, without dial—Wall Set..... .50
Desk Set..... .75

Each station, with dial—Wall Set..... .75
Desk Set..... 1.00

Stations furnished in hotel lobbies connected to the switchboard attended by the hotel operator shall be provided with coin boxes (post-payment type) provided they are distinctly placarded as hotel telephones so as to be distinguished from the telephone company's regular public telephone station. Stations without coin boxes may be furnished at the hotel desk for the convenience of visitors inquiring for guests when restricted to interior use. Any additional facilities that might be required with such stations, such as booths, coin boxes, switchboards, etc., to be furnished and charged the hotel at regular rates.

(c) Trunk lines to central office for use in connection with stations in hotel office and other locations for the exclusive use of hotel management.

Outgoing trunk lines only.

Individual line business unlimited rate.

Tie lines between separate switchboards—See Mileage Rates, Section 3.

Bothway trunk lines to central office for use in connection with stations in guest rooms and lobby and for all incoming messages to be furnished without charge to meet traffic requirements.

The rate for each local exchange message originating at stations in guest rooms and lobby and passing through the hotel private branch exchange switchboard to the central office shall be five cents except that in those cases where the additional service rendered the public at the hotel warrants, a rate of ten cents for each of these local exchange messages may be charged when applied for by the hotel and accepted by the Telephone Company.

The mechanical or electrical design of the private branch exchange will be such that guest room and lobby stations can not be connected to the outgoing trunk lines provided for the exclusive use of the management.

If the switchboard is to be installed outside the primary rate area, see Mileage Rates, Section 3.

Issued: October 2, 1922. Effective: November 1, 1922.

Cancels and supersedes Exchange Rate Schedule effective March 1, 1919.

P. H. Coolidge, General Commercial Superintendent.

[fol. 38] EXHIBIT "D" TO BILL OF COMPLAINT

Findings of Fact, Order, and Opinion

Cases Numbers 4902 and 5344

(Majority Opinion)

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, DIVISION OF PUBLIC UTILITIES

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON ex Rel. THE City of Seattle, The City of Spokane, The City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, The Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY and HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, Respondents,

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Findings of Fact, Order, and Opinion

History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Women's Civic Club of Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them that a determination of the telephone rates for Seattle and

King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company). The Department's engineering and accounting staff, was forthwith directed to proceed with and to make, in co-operation with [fol. 39] engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the Mayor, Council or Commission and City Attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and asking co-operation in the investigation.

March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley. These men, together with our own engineering and accounting staff, worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Deptment a toll rate schedule conforming in principle with their pre-war toll rate schedule.

On September 28, 1922, the city of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

On October 5, 1922, the telephone companies filed the toll rate schedules as directed, and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these, a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to the investigation under way and inviting the writer of the letter or signor of the petition, to be present at hearings subsequently to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first [fol. 40] hearing in this case was held in the City Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examinaion of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Following the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26th at Tacoma and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the results of the investigation made by himself and staff and the maatter was then submitted for determination.

All hearings, except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and to the matters to be considered at that time and place.

At the hearings in the cities of Tacoma and Spokane, some thirty-five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spo-

kane, was represented by its corporation counsel, engineers and accountants.

All the complaints were consolidated for the purpose of hearing and the hearings were joint hearings under the administrative code, requiring a joint decision by the Director of the Department and the Supervisor of Public Utilities and the Supervisor of Transportation.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each.)

[fol. 41] Findings of Fact

I

Rate Base

Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the state of Washington, including the Spokane Exchange, used and useful in public service, was, as of June 30, 1922, $32,108,853.76, which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated in an original proceeding.

As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific system just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is

treated as an integral part of a state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

Due consideration has been given to the items "Construction Work in Progres" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Com-ission of Washington, in its order in [fol. 42] Causes 1810-1825, placing a value for rate making purposes upon the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case.

Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle, where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account, is not ordinarily grouped with the fixed capital accounts in ariving at a rate base. It is our opinion enlarged on in the following discussion, that "Constitution Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base but, as a compensating factor, including in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

"A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the Company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded

from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the Company, no consideration is given to the interest earnings of funds employed in construction work in grogress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that, if the Company were not [fol. 43] permitted to earn on funds employed in construction work, it must be permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the cash required to meet current expenditures. The necessity of an allowance for cash, materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more or less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Funds employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving an earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

The rate of return from operations seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construction Work in Progress" in the rate base and to include the interest accretions with operating income, which method acts as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more, and the company if it be less, than the rate of return from operations.

II

Depreciation

Finding

We find that the annual depreciation charge should be reduced from approximately 6 per cent to 3½ per cent for the period of two years from April 1st, 1923.

[fol. 44] One of respondents' engineers testified that "depreciation is the sum annually set aside to replace property either worn out or become obsolete in service. In other words, it is the sum that is set aside which, at least theoretically, will keep the plant up to service standard, and keep the dollar whole that is in the business."

Under this view, if a utility investment of one million dollars depreciates in value to $900,000.00, the just amount of depreciation reserve would be $100,000.00.

Stated in another way, the depreciation reserve should at all times approximately equal the difference between the original value and the present depreciated value of the property.

The respondents have not furnished any statement of debits against depreciation reserve segregated as to the State of Washington. In a recent twelve-year period, the amount set aside by the Pacific Telephone and Telegraph Company (not limited to the state of Washington) has been $41,212,207.00. The realized depreciation, or the amount withdrawn from the reserve for replacements, has been $20,137,489.00, leaving a balance of $21,074,718.00 less certain expenditures for extraordinary repairs and other unusual items. In other words, the replacement expenditures have been approximately fifty per cent of the amount set aside for depreciation purposes. In percentage it has been about five per cent per annum, with this company as a whole and slightly more than six per cent in the State of Washington for several years past.

At the close of the year 1914, the balance in the depreciation reserve of the company was $10,369,854.00. Prorating this to State of Washington on the basis of plant values, the balance for Washington was $2,418,457.00. Had the company adopted a three and one-half per cent rate of depreciation at the beginning of the year 1915, and debited the depreciation reserve at the company average of 2.47 per cent, the depreciation reserve as of June 30, 1922, would have been $3,945,493.00, or approximately 16 per cent of the depreciable plant value as of the same date. Taking the actual credits to the depreciation reserve, for Washington, an ddebiting for current replacements at the above rate of 2.47 per cent the balance in the reserve as of June 30, 1922, should have been $7,711,014.00 or nearly one-third of the depreciable plant value.

We have found the property of respondents in the State of Washington to be about 85 per cent physical condition.

Under the view expressed by the witness referred to, the depreciation reserve sohuld be approximately 15 per cent of the depreciable property, where the same is found to be 85 per cent physical con-

dition. Had the company accumulated a depreciation reserve at a rate of three and one-half per cent since 1914, the balance would by now be more than 15 per cent as heretofore shown.

In the above calculations we have used the straight line method. If either the sinking fund or annuity method were used by which interest is added to balances, the surplus would be still greater.

The case of "Re Wisconsin Telephone Company" P. U. R. 1922, [fol. 45] B. P. 533, decided by Wisconsin Railroad Commission, involved an application of the telephone company for increased rates in the City of Milwaukee. The facts disclosed that the depreciation reserve balance was about one-third of the fixed capital in the Milwaukee exchange.

The commission fixed the rate of depreciation at three and one-half per cent. We quote the following:

"It is evident that the credits to this reserve for the Milwaukee exchange since 1909 have been excessive and that a charge to operating expenses equalling three and one-half per cent of the depreciable property would have, so far as experience at present shows, been amply to supply a safe margin to meet losses on property retired from service in the Milwaukee exchange, to which exchange alone this discussion relates. The use of three and one-half per cent for the purpose of this case is based upon the assumption that the company is correct in its claim that the charges to the depreciation reserve in the future will of necessity considerably exceed the charges in the past and during the war period."

In this case the evidence satisfies us that the charges to the depreciation reserve in the future will be less than in the past.

Modern telephone equipment is more durable than that of earlier periods.

The buildings, pole lines, and other construction by respondents have in recent years been of a substantial, durable and expensive type, which will depreciate more slowly than earlier construction, much of which has already been replaced.

The addition of these high grade units materially increases the rate base upon which the consumer must pay a return and any saving in the way of lessened depreciation should be reflected somewhere in a computation to determine a reasonable rate.

Measured by the facts stated and principles announced in the Wisconsin case supra, the reduction of the depreciation allowance to three and one-half per cent for a test period of two years is amply justified. In the Wisconsin case the reduction was not limited to a specified period.

Another reason which to our mind justifies a trial period is the fact that the Interstate Commerce Commission is now engaged in a study of the problem of depreciation as applied to telephone properties under the provisions of paragraph (5) of Section 20, of the Interstate Commerce Act.

The first hearing will be held May 1, 1923. The notice of the hearings announces that the straight line, annuity, and sinking

fund methods of determining depreciation charges will be investigated. Without conceding that the Interstate Commerce Commission has power to prescribe a method of computing depreciation as applied to telephone properties, which would be binding upon a state regulatory body in the regulation of purely intrastate traffic, we believe that the results of this investigation will be of immense value in arriving at correct methods of determining depreciation [fol. 46] and for this reason have limited the rate herein prescribed to a two-year period. The final determination of the I. C. C. should be announced within that time.

We are convinced, that measured by any reasonable rule or theory, the depreciation allowance of the respondents in the State of Washington in the past has been greater than necessary. When the depreciation reserve of any public utility becomes greater than the facts of the particular case justify, we believe it proper for the regulatory body to reduce the depreciation allowance, until the amount of the depreciation reserve reaches a proper level.

We will, therefore, order in this case that the depreciation allowance for the two-year period beginning April 1, 1923, shall not exceed three and one-half per cent per annum on the depreciable property of the respondents.

We are not determining hereby a rate of depreciation to be applied generally, in telephone cases. We are here confronted with the fact that more money has accumulated in this fund than necessary, and we are merely reducing the flow until the proper level is reached.

III

The Four and One-half per Cent Contract Licensee Revenue Dr.

Finding

We find that the Four and One-half per cent Contract between the Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company is wrong in principle, contrary to public policy and the compensation thereunder should be computed on the per station basis rather than a percentage of revenue. We find a reasonable charge per annum for the services rendered under said contract to be 90 cents per station.

Discussion

This is a uniform contract required by the American Telephone and Telegraph Company of all subsidiary companies.

Under this so-called four and one-half per cent contract the respondents are obligated to pay the American Telephone and Telegraph Company four and one-half per cent of substantially all of their gross operating revenue for certain rights and services. We have no power to prevent any public utility from entering into a contract with a parent company to share with it any portion of its profits. We have the right, however, to say whether such share

or any part thereof shall be treated as an operating expense. Even at the risk of differing from our predecessor, The Public Service Commission, we are compelled to say that we are not in sympathy with this kind of business. If the parent company performs any service or furnishes any equipment for which payment should be made, such compensation should be based on the value of the service rendered or the reasonable rental of the equipment furnished rather [fol. 47] than upon a *pre*centage of operating revenue. We are opposed to an expense item that arbitrarily increases as the revenue increases.

If an increase in rates is allowed in this case, it means that four and one-half per cent of the increase will accrue to the American Telephone and Telegraph Company, and there is no evidence that such company is in need of additional revenue, and the local company will receive no more from the parent company than it is now receiving. This four and one-half per cent contract has been a "thorn in the flesh" in every community where the respondents operate. It gives rise to suspicions of concealment and dishonesty in every hearing in which it is involved. Not having power to annul it, we believe the respondents and the American Company owe it to the public to wipe it out and put their dealings with the parent company on the basis of actual value of the service rendered and on a plane that is understandable to the average citizen. However innocent or meritorious it may be in fact, this contract is an endless source of controversy and misunderstanding. The American Telephone and *Telephone* Company has in its employ trained and skilled experts who appear at hearings in which this contract is questioned and present skillful expositions of its provisions, and undertake to justify its existence, and yet public distrust of it has increased rather than diminished. We are aware that some courts and commissions have given it their endorsement but after careful consideration we cannot do so. We believe that a utility that has a proper appreciation of the elements that establish wholesome public relations should take steps to remove such a proven source of discord.

In the case of "In re Michigan State Telephone Company P. U. R. 1923-A, page 764," decided by the Public Utilities Commission of Michigan less than a year ago, the Commission said: "The four and one-half per cent contract between the American Telephone and Telegraph Company and the Michigan State Telephone Company is not a contract between corporations dealing at arms length but one between the superior and the inferior—a controlling and a controlled company—the parent company and its subsidiary—the parent company and its Child. The contract is in effect a contract made by the American Telephone and Telegraph Company as proprietor with the agents of itself as owner of the stock of the Michigan State Telephone Company. The directors and officers of the Michigan State Telephone Company are its directors and officers because they are made so by a vote of the American Telephone and Telegraph Company as stockholders of the Michigan State Telephone Company."

The Commission further states: "In this case the directors and

officers of the Michigan State Telephone Company are elected, directed, influenced and controlled by the American Telephone and Telegraph Company. They exercise not their own judgment and discretion but the judgment and discretion of the American Telephone and Telegraph Company which made and may unmake them. Under the law of this state the four and one-half per cent contract is at least presumptively void."

[fol. 48] Substantially the same relations exist between the respondents in this case and the American Telephone and Telegraph Company as existed between the Michigan Company and the American Company. In the same case the Michigan Commission further states:

"Conceding the invalidity of the four and one-half per cent contract, the American Telephone and Telegraph Company is entitled to be reimbursed for the cost of services performed by it for the Michigan State Telephone Company and to have the integrity of its property used by the Michigan State Telephone Company maintained."

The Commission then proceeds with an exhaustive analysis of the services rendered by the American Telephone and Telegraph Company which are substantially similar to those rendered under a like contract with the respondents in this case, and concludes that ninety cents per station is a just allowance therefor. The respondents in this case have 179,614 stations. Ninety cents per station would amount to $161,653. The amount called for by the four and one-half per cent contract on existing rates is $388,365. In other words, the Michigan Commission makes an allowance of something like two per cent instead of four and one-half per cent as provided in the contract. Without going into a further discussion of the value of the services and privileges paid for by the four and one-half per cent fixed in this contract, we will allow 90 cents per station as an operating expense and disallow the remainder.

A few months ago the Nebraska State Railroad Commission in the case of Re Northwestern Bell Telephone Company, 1923 P. U. R. (Adv. Sheets) p. 165, speaking of this contract said: "Considering the question here discussed it appears to us that the basis of charge as provided in the contract is fundamentally wrong and condemned specifically by the Supreme Court of the United States. The company applies the percentage to certain gross revenues received by the applicant. The more revenues the more the charge against revenues for the benefit of the American Company, which method of calculation constitutes a circle—the more the rates the more the charge, ad infinitum."

In the Minnesota Rate case (Simpson v. Shepard), 230 U. S. 232, Mr. Justice Hughes used the following language:

"The value of the use as measured by rate cannot be made the criterion when the rate itself is in question."

In the case of the City of Houston v. Southwestern Bell Telephone Company, etc., U. S. Supreme Court Advance Opinions 1921-

22, No. 16, July 1, 1922 p. 539, is cited by respondents as supporting the contract, but the opinion clearly states that the fact that one company owns stock in another "requires close scrutiny of their dealings to prevent imposition upon the community served by the company."

We have tried to give close scrutiny to this contract and have reached the conclusion heretofore stated.

Even if an allowance equal to two and one-half per cent is made [fol. 49] as an operating expense under this contract the results would not differ materially.

The Pacific Company assigns as a reason for not disturbing this contract that the American Telephone and Telegraph Company and its subsidiary concerns have builded their business and accounting methods upon it. In our opinion if this be true they have builded unwisely on a crumbling foundation.

IV

Machine Switching Project

Finding

We find that the installation of machine switching in Seattle is justified.

Discussion

Machine switching has been installed to replace manual operation in three of the offices of the City of Seattle. Three other offices will be converted to machine switching in the near future. The testimony of respondents' experts is not clear as to what saving in expense, of any, will be made by the substitution of automatic for manual operation. We are satisfied, however, that a material economy will be brought about by the installation of machine switching. In addition to the somewhat unsatisfactory testimony upon this point, we cite an article by a recognized authority on such matters, in Vol. 38, Part 2, of the American Institute of Electrical Engineers page 1571, where the following statement appears:

"Telephone exchanges must pay their way. If automatic exchanges do not pay, there would not be any of them left in existence today, for this movement is twenty-seven years old. Five exchanges formerly manual were converted to automatic. They range in size from 2,300 lines and 4,400 telephones to 38,000 lines and 44,000 telephones. The totals for the five were 47,000 lines and 65,000 telephones. The comparison of expenses is as follows:

	Manual	Automatic
Total operating and maintenance expenses per year	$552,600.00	$136,800.00
Average per line per year	11.77	2.92
Average per telephone year	8.50	2.11

In other words, the operating and maintenance expenses of automatic operation in the case of these five exchanges were about one-fourth the operating and maintenance expenses of manual operation. We do not anticipate such favorable results in a multi-office exchange such as Seattle, but a material saving should ultimately result.

The automatic devices used in the five exchanges above referred to are not those of the Western Electric Company, as installed in Seattle, but it is safe to assume that the Western Electric machine [fol. 50] switching devices are superior from the standpoint of economy and efficiency. They are a later and somewhat costlier product, and we assume that a concern such as the Pacific Telephone and Telegraph Company would not install a device of inferior type.

We must therefore conclude that the installation of the machine switching devices in Seattle will on the whole reduce the company's expenses, and our conclusions and order in this case will be made with that assumption in view.

In arriving at this conclusion we have taken into consideration the greater fixed charges which will accrue on the automatic system by reason of the greater capital outlay.

In addition to financial economies, the installation of machine switching to replace manual equipment is further justified for the following reasons:

1. Speed of connection and disconnection.
2. Ease of obtaining connection and disconnection.
3. Accuracy of connection.
4. Voice transmission.
5. Secrecy.

There is also the elimination of some of the faults inherent in manual operation such as

1. Fluctuations in service.
2. Impairment of service by epidemics, strikes, etc.
3. The mistranslation of calling subscribers' desires.

V

Return

Finding

The rate of return to be realized under existing rates and by application of the proposed increased rates, is shown in the following income statement adjusted to meet the views heretofore expressed in relation to depreciation allowance and the four and one-half per cent contract.

Statement of Operating Income and Rate of Return

Estimate for Year 1923

Revenues

	Present rates	Proposed rates
1. Exchange Service Revenues...	$6,642,437.00	$8,434,253.00
2. Toll Service Revenues.....	2,350,000.00	2,732,358.00
3. Miscl. Operating Revenues....	308,004.00	308,004.00
4 Total Tel. Oper. Revenue.....	$9,300,411.00	$11,474,615.00

[fol. 51]

Expenses

	Present rates	Proposed rates
5. Ordinary Repairs	$1,514,153.00	$1,514,153.00
6. Station Removals & Changes..	267,385.00	267,385.00
7. Depreciation	1,070,937.00	1,070,937.00
8. Traffic Expense.....	2,642,731.00	2,642,731.00
9. Commercial Expense.....	865,011.00	865,011.00
10. General & Miscl. Expense.....	234,659.00	234,659.00
11. Rents	79,950.00	79,950.00
12. Uncollectible Revenues.....	35,618.00	48,367.00
13. Taxes	485,617.00	658,057.00
14. Licensee Revenue—Dr.	161,653.00	161,653.00
15. Total Tel. Oper. Expense.....	$7,357,714.00	$7,542,903.00
16. Operating Income.....	$1,942,727.00	$3,931,712.00
17. Int. during Constr.—Accrued.	148,122.00	148,122.00
18. Adjusted Operating Income...	$2,090,849.00	$4,079,834.00
19. Rate Base.....	$34,789,635.00	$34,789,635.00
20. Per Cent Earned.....	6.01	11.73

NOTE.—The rate base above is the estimated average plant value for year 1923, plus working capital.

Discussion

Without calculating any saving by virtue of the installation of machine switching, it is seen that the return under existing rates is approximately 6 per cent.

Whatever saving can be made through the machine switching program, which we feel will soon be substantial, will serve to increase the returns.

If income statements were prepared for several years past adjusted as above, they would show a fair rate of return.

VI

Existing Rates

Finding

We find that the existing rates are just, fair, reasonable and sufficient.

VII

Proposed Rates

Finding

We find that the proposed increased rates both toll and exchange, are unjust, unfair, unreasonable, and more than sufficient.

[fol. 52]

VIII

Decrease in Rates

Finding

The evidence does not justify any reduction in rates at this time.

IX

Reparation

Finding

The contention made by the City of Seattle for reparation is not supported by the facts or the law and that portion of the complaint should be dismissed.

Petitions to Reopen Case

Some two weeks subsequent to the conclusion of all of the hearings in this case, the Seattle Chamber of Commerce, the Port of Seattle and the County Commissioners of King County, Washington, filed with the Department petitions requesting the reopening of this case. The time for the suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the conclusions we have reached the petitions to reopen the case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entittled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old

proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue the same is hereby dismissed.

Discussion

This Department has had many disagreeable tasks to perform. During the war period the rising cost of labor and materials made it necessary for us to allow increased rates to many utilities to save them from bankruptcy. In almost every decision we held out a hope if not a promise that when conditions returned to normal and the period of inflation had passed rates would come down. Many utility rates have been reduced, some voluntarily and some by order of this Department, but now come the respondents when we had dared hope that our predictions might be realized and ask for a startling increase. We have sought to pursue a straightforward course doing justice to the utilities and the public regardless of pop-
[fol. 53] ular clamor. During the war period the Postmaster General increased the rates of respondents during Federal control. These rates automatically expired and the former rates became revived by the return of the telephone lines to private ownership. Our predecessor, the Public Service Commission, permitted the refiling of the so-called Burleson rates upon one day's notice and they have been in effect ever since though the prices of materials and labor have steadily decreased. The commission was condemned by the press and public for permitting the continuance of these rates. The State of Oregon and other states refused to sanction the Burleson rates and the general telephone rate level has been higher in the State of Washington than in adjoining states until recently. We believe the commission acted wisely in continuing the so-called Burleson rates. If we were convinced that the increases now sought by respondent were necessary and warranted by all facts we would permit them and submit to any censure that would follow with the patience that regulatory bodies must in the nature of things exhibit, but we are not so convinced.

Order

Wherefore it is ordered:

1. That the applications of respondents for increased rates be and the same are hereby denied. That the proposed increased rates in their entirety be and are hereby permanently suspended; that the same shall not become effective, and existing rates shall remain in effect until the further order of the Department.

2. That the annual depreciation allowance be and the same is hereby fixed at three and one-half per cent on the depreciable property of respondents for the period of two years beginning April 1, 1923.

3. That the compensation to be paid the American Telephone and Telegraph Company under said four and one-half per cent contract shall hereafter be computed on the basis of 90 cents per station per annum on the average number of stations.

4. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be and the same is hereby dismissed.

5. That the portions of the complaints seeking reparation or reduced rates be and they are hereby dismissed.

Witness, The Department of Public Works of Washington this 31st day of March, 1923.

The Department of Public Works of Washington, By E. V. Kuykendall, Director. Frank R. Spinning Supervisor of Transportation. Attest: J. H. Brown, Secretary.

[fol. 54] EXHIBIT E TO BILL OF COMPLAINT

Dissenting Opinion

Cases Numbers 4902 and 5344

Dissenting Opinion

For the first time in our association as members of the Department of Public Works of Washington, formerly the Public Service Commission of Washington, my associates and myself have been unable to agree upon a final order.

The majority opinion in this case contains conclusions upon certain fundamental principles of telephone rate regulation to which I cannot subscribe, and which are wholly at variance with my own conclusions.

In my opinion the record in this case fully sustains the conclusions which are expressed in the minority opinion filed herewith.

Dated at Olympia, Washington, March 31, 1923.

Hance H. Cleland, Supervisor of Public Utilities.

Before the Department of Public Works of Washington, Division of Public Utilities

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, ex Rel. The City of Seattle, the City of Spokane, the City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, the Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY and HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, Respondents

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

FINDINGS OF FACT, ORDER, AND OPINION

History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Women's Civic Club of Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them [fol. 55] that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company).

The Department's Chief Engineer, H. J. Flagg, and its engineering and accounting staff, together with Mr. W. W. Hardinger, a consulting telephone engineer with twenty-seven years' experience in the construction, operation and engineering of independent telephone properties employed, by the Department as a special engineer, were forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the Mayor, Council or Commission and City Attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and, that it being a case of unusual magnitude, it was the desire of the Department that the city authorities and their local commercial and other public and civic bodies and organizations cooperate with us in this work, rendering such aid or assistance as possible. These letters and complaints were mailed to the authorities of more than one hundred cities and towns.

On March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal. Subsequently, and on or about March 31, 1922, the City of Seattle employed Mr. T. E. Phipps, an experienced rate and valuation engineer, with whom was associated in the preparation of this case Mr. E. D. Ridley, a well-qualified public utility auditor and accountant.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley, above mentioned. These men, together with our own engineering and accounting staff, worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

[fol. 56] Mr. Ridley and Mr. L. P. Hockett, utility engineer and accountant for the Department, spent several months in San Francisco checking the books, records and accounts of the companies. A thorough check, examination and survey was made in the State of Washington, particularly at Seattle, Spokane and Tacoma. In addition thereto a check and examination of the books, records and accounts of the American Telephone and Telegraph Company in New York and of various companies (including many independent telephone companies) in the reports and records of the Interstate Commerce Commission in Washington, D. C., was made.

On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their prewar toll rate schedule.

On September 28, 1922, the City of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

On October 5, 1922, the telephone companies filed the toll rate schedules as directed, and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed exchange

rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these, a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to the investigation under way and inviting the writer of the letter or signer of the petition, to be present at hearings subsequently to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Following the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26th at Tacoma [fol. 57] and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the results of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings, except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and to the matters to be considered at that time and place. The greater part of these notices were sent to business and professional men in the City of Seattle from whom the greater number of complaints had been received; and it may be interesting to note that although

some 2,300 notices of hearings and personal letters were written to these complainants in the City of Seattle, there were (other than attorneys, engineers and accountants appearing directly for parties of record) only seven persons present at the Seattle hearing who offered any statement whatever upon the subject under investigation and consideration and the only proof offered by these persons was a comparison between their monthly or yearly bills under the old rates and what their bills would be under the company's proposed rates. Of the number who received at least three direct and personal notices and communications concerning the investigation and hearings, many were members of the Seattle Chamber of Commerce, namely one hundred and eight, and at least two were officers of that organization.

At the hearings in the cities of Tacoma and Spokane, some thirty-five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel, engineers and accountants.

The investigation and hearings in this case have been the most comprehensive ever made by the Public Service Commission or the Department of Public Works of Washington, and have extended over a period of fourteen months, during the greater part of which time the Department has been assisted by the engineers and accountants for the cities, who have worked in the spirit of closest co-operation. The Department, through authority vested in it by law, has made available to all parties, all records, books, papers, documents, [fol. 58] data and statistics found in the records of both companies, and has in all cases supplied the engineers and accountants for the cities with all data, records, etc., collected by it from all sources. In fact, the entire investigation and proceeding has been so conducted that (if we may take the liberty of quoting from an interview published in a Spokane paper) Mayor Charles A. Fleming and Corporation Counsel James M. Geraghty of Spokane stated that they were much pleased with the showing made by the engineering experts employed by the state and the city in opposition to the proposed increase in telephone rates, and that the atmosphere prevailing was something entirely different from anything encountered in former hearings; that the officials of the State Department of Public Works showed a spirit of co-operation with Spokane and Seattle, and a determination to make a thorough investigation into the telephone situation before taking action.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each).

Findings of Fact

I

Rate Base

Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the State of Washington, including the Spokane Exchange, used and useful in public service, was, as of June 30, 1922, $32,108,853.76, which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated as an original valuation proceeding.

As to the balance of the Pacific Company's plant in Washington, it is merely the bringing up to date of a valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific [fol. 59] Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific system just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of a state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

Due consideration has been given to the items "Construcion Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Commission of Washington, in its order in Causes 1810-1825, placing a value for rate making purposes upon

the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case. Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle, where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base but, as a compensating factor, including in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

[fol. 60] "A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the Company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the Company, no consideration is given to the interest earnings of funds employed in construction work in progress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that, if the Company were not permitted to earn on funds employed in construction work, it must be permitted to capitalize interest during the entire construction

period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the case required to meet current expenditures. The necessity of an allowance for cash, materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more nor less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Certainly, funds employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving an earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant change owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

The rate of return from operations seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construction Work in Progress" in the rate base and to include in operating in-[fol. 61]come the interest accretions which act as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more, and the company if it be less, than the rate of return from operations.

II

Rate of Return—(Earnings)

Finding

That under the rates applicable during the past seven years the Pacific Telephone and Telegraph Company in the State of Washington, after paying operating expenses, taxes, licensee revenue debtor, and setting aside depreciation, has shown an annual rate of return as follows:

1915	1916	1917	1918	1919	1920	1921	1-1 to 6-30-22	
1.84%	3.40%	3.31%	3.13%	4.67%	4.09%	3.52%	3.35%	(annual)

and that said rate of return during the entire period has been unfair, unjust unreasonable and less than sufficient.

That the estimated rate of return of the Pacific Telephone and Telegraph Company for the State of Washington for the year 1923 under the rates proposed by the companies, computed upon the rate base herein found, will be 9.04%, which would be unjust, unfair, unreasonable and more than sufficient.

That under the rates fixed and allowed by this order, the rate of return will be 7.37% upon the rate base herein established.

Discussion

It has been a consistent policy of the present members of this Department in all rate cases, where satisfactory service was shown to have been given, to allow a rate of return approximating 8% upon the value or rate base as fixed and determined by the Department. It is admitted by counsel for the City of Seattle that the service is satisfactory. The only direct testimony upon this subject was that of a witness for the City of Seattle, who stated that 8% was a fair rate of return upon money invested in telephone plant. As testified on cross-examination by certain witnesses (telephone users) for the City of Tacoma, a rate of return ranging from 6% to 10% was by them deemed reasonable, should they invest their money, depending upon the nature or class of business in which the investment was made.

For convenience of study, and to make the manner and method of computation clear, there is here inserted an income statement for the years 1920, 1921 and the first six months of 1922. We will define and discuss each of the items therein. The numbers refer to the corresponding account title on the statement.

[fol. 62] Statement of Operating Income and Rate of Return, Pacific System, State of Washington

	1920	1921	January 1 to June 30, 1922
1. Telephone Operating Revenues	$7,754,052.82	$8,114,245.13	$4,165,420.49
Deductions from Revenues:			
2. Telephone Operating Expenses (excl. Dep.)	4,716,709.05	5,043,458.88	2,573,994.76
3. Taxes Assignable to Operations	600,045.53	543,449.27	262,310.09
4. Uncollectible Operating Revenues	17,321.26	29,028.68	17,061.75
5. Depreciation (on Depreciable Property)	1,177,558.87	1,321,585.78	727,295.13
6. Licensee Revenue—Dr.	327,106.58	342,658.03	173,421.04
7. Total Deductions from Revenue	$6,838,741.29	$7,280,180.64	$3,754,083.58
8. Operating Income	915,311.53	834,064.49	411,336.91
9. Interest during Construction	17,959.48	90,491.52	97,965.71
10. Adjusted Operating Income	$933,271.01	$924,556.01	$509,302.62
11. Rate Base (Incl. C. I. P.)	$22,821,159.54	$26,232,691.37	$30,425,113.89
12. Rate of Return	4.09%	3.52%	3.35%

NOTE.—Line 11—Amounts are average for the perio l hence do not agree with rate base finding since the latter is of a specific date, namely June 30, 1922.

[fol. 63] 1. Telephone Operating Revenues.—This the total annual revenue arising from the conduct of the telephone business. From this amount, and before any balance is available for the payment of dividends or interest on bonds or other obligations, there is properly deductible Items 2, 3, 4, 5 and 6.

2. Telephone Operating Expenses (Excluding Depreciation).—This item includes salaries, wages, materials, and all other expenses of operating a telephone plant, except those covered by Items 3, 4, 5 and 6. No interest of any kind is included in any of the items deductible from Telephone Operating Revenues.

3. Taxes Assignable to Operations.—This item includes all federal, state, county and municipal taxes paid by the telephone company.

The department has heretofore consistently refused the allowance of income tax in all utility matters coming before it. However, in view of recent decisions of the Supreme Court of the United States, federal courts and the Interstate Commerce Commission, we are constrained to reverse our former holding and practice in this regard, and to follow the law as definitely settled by the courts, which is, that Federal income tax is properly deductible from operating revenues.

Consolidated Gas Company of New York vs. Newton, 267, Federal 231.
Newton vs. Consolidated Gas Company, 42 Sup. Ct. 264.
Galveston Electric Company vs. Galveston, 66 Law Ed. 382.
Reduced Rates 1922, — I, C. C. 683.

4. Uncollectible Operating Revenue.—This item includes the charges for telephone and other services, which, after a reasonably diligent effort to collect, have proved impracticable of collection. Only uncollectible bills for amounts which have been treated as operating revenues (see above) are included in this account.

5. Depreciation (on Depreciable Property).—Under the system of accounts prescribed by the Interstate Commerce Commission and adopted by the Department of Public Works, telephone companies operating in the State of Washington are required to establish and include in their yearly and monthly operating expenses, a charge sufficient to cover depreciation of plant due to wear and tear, obsolescence, inadequacy, public demand, extraordinary accidents, catastrophes, etc. These charges are carried to a depreciation reserve, and the costs of all replacements of plant units, instead of being included in the ordinary repairs accounts, are charged against the depreciation reserve. Owing to the fact that the annual depreciation charge must be estimated, there naturally have been some slight differences of opinion as to just how this annual charge should be estimated, and just about what percentage of plant cost it should be. It is apparent that while the percentage necessary in the case of one exchange may vary to some extent from the percentage necessary in the case of another exchange, due to a possible difference in the char-
[fol. 64] acter of the physical property contained in each; yet at

the same time, there should be no material differences in the annual charges necessary for large telephone systems, involving a number of exchanges, large and small, in different portions of a state, where climatic and other conditions are not the same.

The question here involved and to be determined, is as to what reasonable annual percentage should be allowed for depreciation of respondent's plant in this state.

In computing the rate of return, in all statements found herein, annual depreciation has been allowed at a percentage of 5.25%.

The subject of depreciation was covered fully by witnesses for the companies, for the Department and for the City of Seattle, and the percentages recommended by each were as follows:

Companies 5.75%
City of Seattle..... 5.88% (exchange plant only).
Department's Engrs. 5.25%

In Case No. 4747, Public Service Commission of Washington et al. vs. Pacific Telephone and Telegraph Company, decided February 13, 1919, the Public Service Commission of this state approved depreciation for the company at an annual percentage of 5.72%, and 5.72% was the percentage allowed by agreement with the Federal Government during the period of Federal control of the telephone systems of the United States.

In addition to our finding of depreciation at 5.72% in Cause No. 4747, depreciation percentages were allowed by us in the following cases:

Cause No. 5040, City of Port Angeles vs. Angeles Telephone and Telegraph Company, Nov. 17, 1920, 5.72%.

Cause No. 5076, Camas Commercial Club vs. Camas Telephone and Telegraph Company, February 1, 1921, depreciation allowed 6%.

Cause No. 5127, Commission vs. Oregon-Washington Telephone Company, January 4, 1921, rate not stated in order, but 5.72% found in working papers.

There is included herein a tabulation of decisions on depreciation by commissions and courts. There are 112 commission decisions and eight court decisions.

It is found from an analysis of these decisions that the rates for depreciation fixed by the regulatory bodies generally were considered to apply to the property as a whole, either to the total actual cost or the total reproduction cost, or to the total value. The percentages allowed range from a minimum of 2.26% to a maximum of 10%. In twelve of the cases, the allowance was below 5%; in fifty cases the percentage was from 5% to 6%; in forty cases the percentage was from 6% to 7%, while in ten cases the allowance in excess of 7%. The average allowance was 5.972%. It will also be noted that in ninety of the 112 cases reported, the depreciation allowance fell between 5% and 7%.

[fol. 65] Tabulation of Cases on Depreciation

Jurisdiction	Citation		Rate fixed
Alabama	PUR1919B	791	5.50
Arizona	PUR1920B	411	6.00
Arkansas	PUR1921B	516	6.40
California	PUR1915F	1014	5.50
California	PUR1922A	853	5.50
California	PUR1922C	97	3.28
Colorado	PUR1917B	198	5.65
Georgia	PUR1921C	833	5.11
Hawaii	PUR1921B	209	6.80
Idaho	PUR1916C	438	6.07
Idaho	PUR1920E	321	6.00
Illinois	PUR1915D	646	5.00
Illinois	PUR1916B	318	7.00
Illinois	PUR1916D	781	6.58
Illinois	PUR1917A	658	6.00
Illinois	PUR1917B	368	6.00
Illinois	PUR1918B	172	5.50
Illinois	PUR1918E	74	5.50
Illinois	PUR1915E	23	5.50
Indiana	PUR1917F	209	4.50
Indiana	PUR1918C	489	5.00
Indiana	PUR1918E	859	5.00
Indiana	PUR1918E	669	5.00
Indiana	PUR1920C	209	5.00
Indiana	PUR1920C	854	5.00
Indiana	PUR1919E	504	5.00
Indiana	PUR1920A	422	5.00
Indiana	PUR1920B	813	5.00
Indiana	PUR1920D	83	5.00
Indiana	PUR1922E	46	5.00
Kansas	PUR1915B	507	6.00
Kansas	PUR1918C	55	6.50
Kansas	PUR1918C	777	5.72
Kansas	PUR1922A	321	4.36
Louisiana	PUR1922E	86	5.00
Maine	PUR1920C	386	3.32
Maryland	PUR1916C	925	6.25
Michigan	PUR1921C	545	5.00
Michigan	PUR1921E	308	5.00
Michigan	PUR1923A	30	4.00
Minnesota	PUR1916C	141	8.94
Minnesota	PUR1921C	733	4.50
Missouri	PUR1915C	366	6.50
Missouri	PUR1920E	59	7.00
Missouri	PUR1919A	659	5.50
[fol. 66] Missouri	PUR1922A	773	6.00
Nebraska	PUR1915E	57	6.00

Jurisdiction	Citation		Rate fixed
Nebraska	PUR1919A	35	6.00
New Hampshire	PUR1918F	592	7.00
New York	PUR1916B	940	5.80
New York	PUR1920D	529	5.66
North Dakota	PUR1921E	567	6.00
North Dakota	PUR1922E	602	5.00
Ohio	PUR1922A	155	5.00
Oregon	PUR1915F	290	2.39
Oregon	PUR1919D	345	3.55
South Dakota	PUR1915A	562	7.00
South Dakota	PUR1915B	223	7.00
South Dakota	PUR1915E	516	6.00
South Dakota	PUR1916A	364	7.00
South Dakota	PUR1916D	603	6.00
South Dakota	PUR1919B	734	7.00
South Dakota	PUR1922D	769	4.00
Utah	PUR1919C	566	6.50
Virginia	PUR1922A	756	5.50
West Virginia	PUR1921B	97	6.10
Wisconsin	2WRCR	105	3.67
Wisconsin	2WRCR	358	8.00
Wisconsin	2WRCR	427	10.00
Wisconsin	2WRCR	546	7.00
Wisconsin	3WRCR	117	8.00
Wisconsin	3WRCR	412	8.00
Wisconsin	3WRCR	452	8.00
Wisconsin	4WRCR	1	8.00
Wisconsin	4WRCR	259	7.50
Wisconsin	4WRCR	370	7.00
Wisconsin	4WRCR	407	7.00
Wisconsin	4WRCR	414	7.00
Wisconsin	6WRCR	211	8.00
Wisconsin	6WRCR	419	6.50
Wisconsin	6WRCR	549	6.50
Wisconsin	6WRCR	573	6.50
Wisconsin	7WRCR	428	7.00
Wisconsin	7WRCR	608	7.00
Wisconsin	8WRCR	92	6.50
Wisconsin	9WRCR	383	6.50
Wisconsin	9WRCR	489	6.07
Wisconsin	11WRCR	180	6.50
Wisconsin	11WRCR	402	7.00
Wisconsin	11WRCR	499	6.50
Wisconsin	11WRCR	666	6.52
Wisconsin	13WRCR	540	6.50
[fol. 67] Wisconsin	14WRCR	157	7.00
Wisconsin	14WRCR	594	6.50
Wisconsin	15WRCR	182	9.00
Wisconsin	15WRCR	552	7.00
Wisconsin	16WRCR	402	6.67

Jurisdiction	Citation		Rate fixed
Wisconsin	16WRCR	473	6.50
Wisconsin	16WRCR	758	7.00
Wisconsin	PUR1916C	1020	5.00
Wisconsin	PUR1916D	631	6.50
Wisconsin	PUR1917A	439	5.17
Wisconsin	PUR1917C	507	5.50
Wisconsin	PUR1917E	540	6.00
Wisconsin	PUR1919D	909	6.00
Wisconsin	PUR1920C	1019	6.00
Wisconsin	PUR1921E	171	4.58
Wisconsin	PUR1922A	164	6.00
Wisconsin	PUR1922B	91	5.00
Wisconsin	PUR1919F	92	5.21
Wisconsin	PUR1922B	553	3.50
Wisconsin	PUR1922D	368	5.00

The following court decisions also discuss the matter at some length:

Pioneer Telephone Company, Oklahoma, 118 Pac. 363.

Railroad Company v. Richmon, 96 U. S. 521.

Munn v. Illinois, 94 U. S. 133.

Cumberland Telephone and Telegraph Company v. Louisville 187 Federal, 637.

Cumberland Telephone and Telegraph Company v. Memphis, 183 Federal, 875.

Cumberland Telephone and Telegraph Company v. Railroad Commission, 156 Federal 823.

Home Telephone and Telegraph Company v. Carthage, 139 S. W. 547.

Bell Telephone Company v. Houston, Texas, P. U. R. 192D, 793.

6. Licensee Revenue Debtor (4½% Contract).—This is a contract between the American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane whereby the Pacific Company and the Home Company pay to the American Company four and one-half per cent of the gross revenue from four principal classes of service, namely; 1st, Subscribers' Station Revenue; 2nd, Public Pay Station Revenue; 3rd, Private Exchange Line Revenues, and 4th, Message Toll Revenues; less Uncollectible Operating Revenues. The total amount paid by the Pacific Company and the Home Company under this contract in the year 1921 was $342,658.03. The consideration for this payment is that the American [fol. 68] Telephone and Telegraph Company supplies at all times to the Pacific Company and the Home Company certain instrumentalities, services, etc. These instrumentalities and services may be briefly designated as follows:

1. Telephone transmitters, receivers and induction coils.

2. Rights under all patents owned or controlled by the American Company covering use of telephonic devices, apparatus, methods and systems.

3. The right to use all standardized, new and improved apparatus and methods developed through research and experimental work by the American Company.

4. A guarantee of freedom from rayalties, damages and expenses on account of patents arising out of recommended use of apparatus, methods and systems.

5. An organization to prosecute continuously the fundamental work of research and investigation to the end that safety, economy and efficiency in the business will be promoted.

6. Advice and assistance in general engineering, plant, traffic, operating, commercial, accounting, patent, legal, administrative and other methods involved in the efficient, economical and successful conduct of the telephone business.

7. Advice and assistance in the financing necessary to develop and enlarge the plants of the Pacific and the Home Companies.

8. Assistance, co-operation and support in promoting the health and welfare of the employes, including the plant for employes' pensions, disability benefits and death benefits with a provision for guaranteeing the integrity of the funds provided by the Pacific and Home companies for this purpose.

Instrument Service (Receivers, Transmitters and Induction Coils).—It is conceded in this case, by all parties, that, should the only service performed by the American Company be the so-called instrument service, the annual charges therefor which might properly be allowed as a deduction from revenue would be in excess of 53 per cent of the total amount paid by respondents to the American Company under the four and one-half per cent contract. This particular item is referred to in the record and the briefs as "instrument service."

Other Services.—In our opinion, the cost to the Pacific Company and the Home Company of the other items of service, etc., rendered by the American Company to them would greatly exceed the other 47 per cent of the amount paid under the contract. It is our opinion that the value of the services rendered by the American Company exceeds th amount paid therefor, and we, accordingly, allow the full amount charged therefor as a deduction from revenue. However, it is also our opinion that the method used in computing [fol. 69] the compensation to be paid for these services is not correct in principle. As it is now a revision of rates resulting in a change in revenue brings about a corresponding change in the amount in dollars to be paid under the contract. In other words, having found that four and one-half per cent of certain gross revenues under existing rates is just and equitable, it can not logically be said that

four and one-half per cent of the revenue derived from increased rates is also fair without some showing of additional facilities furnished or services rendered by the American Company. We believe that a method of computing the payments under the contract which will not be influenced proportionately by changes in operating revenues can be found. Such a method would be more equitable and less objectionable than the present flat percentage method. We are, therefore, adopting a method of determining the amount of compensation which should be paid, which we believe will accomplish that end and at the same time be fair to the companies and to their patrons. Naturally, as an exchange or a plant increases there will be a greater demand for instrumentalities and service and this demand will grow as the size and importance of the exchange increases or grows. Therefore, in our opinion, the only fair and logical method of fixing and standardizing this compensation is upon a per station basis. We believe that the present compensation in dollars is reasonable for the service rendered and should be approved. Dividing the contract payment for 1922 by the average number of exchange stations served by respondents a figure of $2.15 per station is derived. Therefore in this case the amount of compensation for services performed under this contract that is approved as a deduction from revenue is computed at the rate of $2.15 per exchange station. The total approved allowance for this compensation is not changed by the increase in rates allowed.

The four and one-half per cent contract has been the subject of investigation by practically every public service commission or similar regulatory body in the United States, and it is of interest to note that the full four and one-half per cent has been allowed by twenty-one commissions, and that the amount has been reduced by only seven commissions. Ten state commissions have not only allowed the full amount under the contract but have approved the percentage method of computing compensation. Eleven states although they have allowed the full amount, have not approved the percentage method.

The contract has been the subject of exhaustive investigation by the Public Service Commission of this state as far back as the year 1912 and we have in our files as a result of the first investigation two volumes of some 540 pages of testimony and exhibits relating thereto. At that time two members of the Public Service Commission of this state held an inquiry in New York City, the home office of the American Telephone and Telegraph Company, and inquired into every conceivable angle of the subject.

This matter was before he Public Service Commission of this state in our Cause No. 4747 Public Service Commission, et al. v. Pacific Telephone and Telegraph Company and the Postmaster General. [fol. 70] and in the decision (1919 annual report, page 168) we find the following:

"At a large expense this Commission several years ago made a thorough investigation of this contract, but at that time entered no order concerning it. We have reached the conclusion that it is a

beneficial arrangement conducive to telephonic development and service. A number of other state commissions have analyzed and discussed it and in the main have supported it."

And again in that same order, we find the following:

"Between the Bell System and its constituent companies there has for many years existed what is known as the four and one-half per cent (4½%) contract. This contract is recognized and made a part of the agreement between the Bell system and the constituent companies joining and the Postmaster General."

The Supreme Court of the United States, in City of Houston v. Southwestern Bell Telephone Company and Southwestern Bell Telephone Co. v. City of Houston et al., U. S. Supreme Court Advance Opinions 1921-22, No. 16, July 1, 1922, p. 539, stated:

"The American Telephone and Telegraph Company owns substantially all of the stock of the Company and a large majority of the stock of the Western Electric Company. From the American Telephone and Telegraph Company the Company leases its instruments and secures their maintenance and renewals, and from the Western Electric Company it obtains the greater part of its equipment and supplies used in operating its local exchange. It is contended by the City that no fair disclosure was made of the profits made by the furnishing companies on the instruments and on the material and supplies so furnished, and that, for this unique reason, the Company should not be heard in a court of equity and the case should be dismissed. It is true that the Company did not introduce proof to show what the profits of the two companies were, either upon the business done with it or on their entire business; but it did introduce much evidence tending to show that the charge made and allowed for the services rendered and supplies furnished by them was reasonable and less than the same could be obtained for from other sources. Under the circumstances disclosed in the evidence, the fact that the American Telephone and Telegraph Company controlled the Company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of their dealings to prevent imposition upon the community served by the company, but the Court recognized and applied this rule."

Although there are many Commission decisions, whereby the four and one-half per cent contract is discussed in detail, and approved, as above indicated, we think it necessary to quote from only one of these decisions, as bearing upon the reasonableness of the compensation paid for the services rendered.

[fol. 71] We quote from a decision of the Commission of the State of Alabama, City of Birmingham v. Southern Bell Telephone Co., 84 Commission Leaflet No. 1 (1918):

"The development of the general staff of the American Telephone and Telegraph Company has so grown, and its functions so broadened, that at the present time it renders available to the respondent

company"—(the respondent company was in the position of the Pacific and Home Companies here)—"the entire telephone experience of the world, with everything that is of general value in the telephone art and sciences, whether covered by patents or not. It is plain to the Commission that it is absolutely necessary for the respondent company to keep in touch at all times with all improvements in the telephone arts and sciences, and whether it does this through contract with the American Telephone and Telegraph Company, or through its own efforts, the Commission is not concerned.

"The Commission is naturally interested as to whether the respondent company could get this service cheaper in some other way, either by furnishing it itself, or by some other source. It is obvious that much of this service could not be obtained any other way, either by furnishing it itself, or by some other source. It is render to every one all of the patent inventions which so largely make up the improvements in the arts of telephony. If each telephone company attempted to organize a general staff, it appears to the Commission that each company would absolutely retain its own inventions, and no company could acquire the right to use everything that will aid in the most efficient and economical service. Moreover, the expense of such organization, it occurs to the Commission, would be prohibitive, unless it were distributed over a large system.

"The fact, if it be a fact, that this arrangement or contract is also a desirable contract from the standpoint of the American Telephone and Telegraph Company does not, to the mind of this Commission, affect the situation whatsoever. This is ordinarily true, of course, of all such contracts. If, for instance, the respondent company rented its instruments from some one else, the person who rented them to the company would expect a profit, and would certainly be entitled to one. Sound business transactions benefit all parties to them."

7. Total Deductions from Revenue.—This is the total of items 2, 3, 4, 5 and 6 and comprises all expenditures reasonably deductible from revenue in computing a rate of return.

8. Operating Income.—This is the residue of operating revenue remaining after paying all expenses of operation except interest and dividends. It is obtained by subtracting item 7, from item 1.

9. Interest During Construction.—This item comprises the accruals of interest on moneys expended on construction work in progress and is computed on the monthly balances in that account. It is added to item 8 as an offsetting factor for the inclusion of Construction Work in Progress in the rate base.

[fol. 72] 10. Adjusted Operating Income.—This item is merely the sum of items 8 and 9.

11. Rate Base.—This item is the amount in dollars upon which the utility is entitled to earn a reasonable return. It is derived from

the rate base figure in Finding I. The amounts stated herein are average figures for the period and do not represent the rate base as of any specific date.

12. Rate of Return.—This item is the percentage obtained by dividing the Adjusted Operating income by the Rate Base. It is analogous to an interest rate and represents the percentage earning or interest on the rate base.

III

Hotel Rates

Finding

The rates proposed by the respondent applicable to hotels are in our opinion unjust, unfair and unreasonable for the service rendered, and the same will be disallowed. Just, fair, reasonable and sufficient rates for this service are included in the rate schedule herein set forth.

IV

Toll Message Rates

Finding

The charges for toll messages now made by the respondent are unjust, unfair, unreasonable, and less than sufficient. The respondent Pacific Company should therefore file a revised toll rate schedule in accordance with the following specifications.

1. The classes of service at present being given to be continued.

2. The distance or base rates on each intrastate route to remain unchanged.

3. In all other respects the revised toll rate schedule, rules and regulations, shall be similar to the present tariff now in effect with the following exceptions:

a. The initial period for all station-to-station intrastate messages shall be three minutes, and the charge for each additional minute or fraction thereof shall be one-third of the initial rate.

b. The initial period for all person-to-person, messenger and appointment intrastate messages shall be two minutes and the charge for each additional minute or fraction thereof shall be one-half of the initial rate.

[fol. 73] c. If the initial rate for station-to-station messages is not evenly divisible by three, the charge for each additional minute or fraction thereof for this classification shall be calculated to the next lower multiple of five cents.

d. If the initial rate for person-to-person, messenger or appointment calls is not evenly divisible by two, the charge for each additional minute or fraction thereof for these classifications shall be calculated to the next lower multiple of five cents.

Discussion

As stated in our order suspending the company's proposed rates we have reached certain conclusions which we consider more or less fundamental in connection with the rate structure of telephone utilities.

a. From facts thus far developed the Department is inclined to the view that property used and useful devoted to the service of the public should be considered as a whole and the rate schedule so designed as to produce a reasonable return on a reasonable value of the property as a whole, provided that no form of tariff or system of grouping, or segregation, should be adopted that will unduly favor any community or class of communities, to the disadvantage of others.

b. That the toll or long distance rate schedules should be in keeping with the competitive conditions to be met and with due regard to the value of the service rendered, to the end that the local exchange rate schedules, which intimately touch the lives of all of the people of this state and which are a domestic necessity, should be as low as possible.

The changes above directed in the toll rate schedule will accomplish the result contemplated by the Department in its suspension order.

V

Exchange Rates

Finding

The existing exchange rates and charges of the respondents are unjust, unfair, unreasonable and less than sufficient. The exchange rates proposed by the respondents in their respective tariffs W. D. P. W. No. 3, are unjust, unfair, unreasonable and more than sufficient. The exchange rates as set out on succeeding pages herein are just, fair, reasonable and sufficient.

That the respondents should file with this Department tariffs containing the schedule of rates herein found to be just, fair, reasonable and sufficient, but containing in all other respects the same rates, rules and regulations as are contained in their respective exchange [fol. 74] rate schedules, W. D. P. W. No. 3, now on file with the Department and under suspension.

That had said rates been in effect during the entire calendar year of 1923, the Pacific system in the State of Washington would have realized a rate of return of 7.34 per cent, as computed on the esti-

mated rate base for that year of $34,789,635.00, which rate of return is just, fair, reasonable and not more than sufficient.

Rates, Seattle Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.50	$10.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$.05
Extension (with or without bell)	.75	1.00	..	..

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05

*25¢ per month additional.

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.25	$4.50
Two-party Line	3.50	3.75
Four-party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

[fol. 75] Rates, Tacoma Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.00	$8.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	...

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05

*25c. per month additional.

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Two-party Line	2.75	3.00
Four-party Line	2.25	2.50
Extension (with or without bell)	.75	1..00
Suburban—Ten-party Service	3.00	3.25

Rates, Spokane Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

[fol. 76]

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	...

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05

*25c. per month additional.

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.75	$4.00
Two-party Line	3.00	3.25
Four-party Line	2.50	2.75
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Line	3.00	3.25

Hotel Private Branch Exchange Service Rates, Seattle, Tacoma, and Spokane Exchanges, Unlimited Service

Switchboard or Order Board with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3.00
Non-Multiple Cord Type.	
10 lines or less in use	5.00
11- 30 lines in use	6.00
31- 60 lines in use	7.00
61-100 lines in use	8.00
101-150 lines in use	9.00
151-200 lines in use	10.00
201-260 lines in use	11.00
261-320 lines in use	13.00
Multiple Cord Type:	
Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jacks or portion thereof	.30

[fol. 77] Stations on Premises in which Switchboard or Order Board is Located and Connected with That Board

	Seattle	Tacoma	Spokane
Each station not in guest room—			
Without dial—Wall Set	$1.25	$0.95	$1.00
Desk Set	1.50	1.20	1.25
Each station not in guest room—			
With dial—Wall Set	1.50	1.15	1.20
Desk Set	1.75	1.40	1.45
Each station in guest room—			
Without dial—Wall Set	.75	.55	.60
Desk Set	1.00	.80	.85
Each station in guest room—			
With dial—Wall Set	1.00	.75	.80
Desk Set	1.25	1.00	1.05

Stations outside premises in which switchboard or order board is located—See Mileage Rates, Section 3.

Trunk Lines to central office from switchboards or order boards. Each bothway trunk line—Individual Line business rate plus $3.00. Each incoming trunk line—Individual Line business rate.

Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[fol. 78] Statement of Operating Income and Rate of Return Estimate for the Year 1923

	Present rates	Company rates	Department allowed rates
1. Operating Revenues	$9,300,441.00	$11,474,615.00	$10,751,350.00
Deductions from Revenues:			
2. Operating Expenses (excl. Depreciation)	5,603,889.00	5,603,889.00	5,603,889.00
3. Taxes Assignable to Operations	581,000.00	658,057.00	637,413.00
4. Uncollectible Revenues	35,618.00	48,367.00	44,445.00
5. Depreciation (on Depreciable Property)	1,674,024.00	1,674,024.00	1,674,024.00
6. Licensee Revenue—Dr.	386,170.00	386,170.00	386,170.00
7. Total Deductions from Revenues	$8,280,701.00	$8,370,507.00	$8,345,941.00
8. Operating Income	$1,019,740.00	$3,104,108.00	$2,405,409.00
9. Interest during Construction	148,122.00	148,122.00	148,122.00
10. Adjusted Operating Income	$1,167,862.00	$3,252,230.00	$2,553,531.00
11. Rate Base (incl. Const. Work in Progress)	$34,789,635.00	$34,789,635.00	$34,789,635.00
12. Rate of Return	3.36%	9.35%	7.34%

[fol. 79] Farmer Line Rates

Finding No. VI

We find that irregularities and discrimination exist in the rates now being charged by respondent for farmer line service. In order to equalize and standar-ize these rates the respondent should file a supplement to its tariff effective on and after April 1, 1923, carrying the following schedule of charges:

Where the number of exchange stations is	The annual farmer line rate shall be
Over 20,000	$15.00
10,000 to 20,000	11.00
5,000 to 10,000	8.00
3,000 to 5,000	6.00
2,000 to 3,000	5.00
1,000 to 2,000	4.00
500 to 1,000	3.50
Under 500	3.00

Reparation

Finding No. VII

The contention made by the City of Seattle relative to the validity of the present rates of the company and their prayer for a general reparation order is not supported by the facts or the law, and that portion of the complaint should therefore be dismissed.

Discussion

The existing rates of the Pacific Telephone and Telegraph Company were first established during the period of Federal control, and inasmuch as there existed a doubt as to the validity and legality of rates established during that period being legally continued without some affirmative action on the part of the Commission, the Pacific Telephone and Telegraph Company at the conclusion of Federal control refiled with the Commission the same schedule of rates and the Public Service Commission entered an affirmative order permitting the same to become effective on less than statutory notice.

We find nothing in the record which would lead us to any conclusion except that the rates now in effect are and have been since the conclusion of Federal control the only legal and valid rates applicable during that period.

Petitions to Reopen Case

Some two weeks subsequent to the conc-usion of all of the hearings in this case, the Seattle Chamber of Commerce, the Port of Seattle [fol. 80] and the County Commissioners of King County, Washington, filed with the Department petitions requesting the reopening

of this case. The time for the suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the foregoing statements relative to procedure notice, etc., the wide newspaper publicity given the matter periodically since the latter part of the year 1921, and in the absence of a showing warranting the same (the matters in the petition pertinent to the issues having been fully covered by the investigation and reports) petitions for the reopening of this case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue the same is hereby dismissed.

Order

It is hereby ordered

1. That the respondents, Pacific Telephone and Telegraph Company and Home Telephone and Telegraph Company of Spokane, file with this Department within fifteen (15) days from the date of service of this order, tariffs or supplements to their respective tariffs in conformity with the findings of fact and directions herein contained; and that all rates, rules and regulations as amended or supplemented as herein found and ordered be, and they are hereby made effective as of April 1st, 1923.

2. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be, and the same is hereby dismissed.

Witness The Department of Public Works of Washington this 31st day of March, 1923.

Department of Public Works of Washington, By —— ——, Director. Hance H. Cleland, Supervisor of Public Utilities. By —— ——, Supervisor of Transportation. Attest: —— ——, Secretary.

[fol. 81] EXHIBIT "F" TO BILL OF COMPLAINT

The Pacific Telephone and Telegraph Company

Exchange Rates, Seattle-Tacoma, Washington; Farmer Line Rates, Exchanges, State of Washington; Toll Rates, State of Washington, Set Out in Dissenting Opinion of Hance H. Cleland, Supervisor of Public Utilities, State of Washington, in Case Numbers 4902 and 5344

Seattle Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.50	$10.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$.05
Extension (with or without bell)	.75	1.00	...	....

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*.	$.05

*25c. per month additional.

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.25	$4.50
Two-party Line	3.50	3.75
Four-party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

[fol. 82] Tacoma Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.00	$8.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	....

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05

*25c. per month additional.

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Two-party Line	2.75	3.00
Four-party Line	2.25	2.50
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

Hotel Private Branch Exchange Service Rates, Seattle and Tacoma Exchanges, Unlimited Service

Switchboard or Order Board with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3.00

[fol. 83] Non-Multiple Cord Type:

10 lines or less in use	5.00
11- 30 lines in use	6.00
31- 60 lines in use	7.00
61-100 lines in use	8.00
101-150 lines in use	9.00
151-200 lines in use	10.00
201-260 lines in use	11.00
261-320 lines in use	13.00

Multiple Cord Type:

Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jack or portion thereof	.30

Stations on Premises in Which Switchboard or Order Board is Located and Connected with That Board

	Seattle	Tacoma
Each station not in guest room, without dial:		
Wall Set	$1.25	$0.95
Desk Set	1.50	1.20
Each station not in guest room, with dial:		
Wall Set	1.50	1.15
Desk Set	1.75	1.40
Each station in guest room, without dial:		
Wall Set	.75	.55
Desk Set	1.00	.80
Each station in guest room, with dial:		
Wall Set	1.00	.75
Desk Set	1.25	1.00

Stations outside premises in which switchboard or order board is located—See Mileage Rates—Section 3.

Trunk lines to central office from switchboard or order boards. Each bothway trunk line—Individual Line business rate plus $3.00. Each incoming trunk line—Individual Line business rate.

Tie lines from switchboard of order board or between separate switchboards—See Mileage Rates, Section 3.

Applicaitons are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[fol. 84] Farmer Line Rates

Where the number of exchange stations is	The annual farmer line rate shall be
Over 20,000	$15.00
10,000 to 20,000	11.00
5,000 to 10,000	8.00
3,000 to 5,000	6.00
2,000 to 3,000	5.00
1,000 to 2,000	4.00
500 to 1,000	3.50
Under 500	3.00

The Pacific Telephone and Telegraph Company, State of Washington Inter-Exchange Rates for Intrastate Telephone Toll Messages

I. Classification of Intrastate Toll Telephone Service

The following classes of telephone toll message service shall be furnished effective 12:01 A. M., —— 21, 1922.

1. Station to-station Messages.—This service shall be defined by the following conditions:

(a) Orders for station-to-station service shall specify the telephone station called, either by telephone number, or by the name of the subscriber of the called station.

(b) Under this classification, orders will not be accepted to establish communication between particular persons.

(c) The measurement of the duration of a station-to-station message for purposes of the application of rates shall begin at the moment when telephonic communication is established between the called and the calling stations. The term "station" for the purpose of this clause is defined to include a private branch exchange switchboard operator, in those cases where private branch exchange systems are involved in station-to-station service.

(d) Station-to-Station service may be operated as a Number Service, in which case the called station may be designated only by

number, through A and B switchboards, or through tandem operators, etc.; or it may be operated through toll switchboards, and technically known as an "AY" service, depending on the local circumstances as to operating conditions, plant conditions, and the circumstances as to directory distribution and areas; and the more economical method will be employed in each case. The choice of method of operating station-to-station service will be determined solely as an operating arrangement, not in any way affecting rates or service; except that where the number method is employed orders will be accepted stating only the telephone number of the called station.

[fol. 85] (c) The charges for station-to-station messages shall not be "reversed," i. e., collected at the called station.

2. Person-to-person Calls.—This service shall be defined by the following conditions:

(a) Orders will be accepted to establish communication between specified persons.

(b) The measurement of the duration of a person-to-person message for the purpose of the application of rates shall begin at the moment when communication begins with or between the particular person or persons specified in the order; provided that certain report charges will be made under the conditions specified in the clause next below, where communication may not be established.

(c) Orders for person-to-person service shall be accepted only under the condition that a limited charge (to be known as "Report Charge") will be made in the following cases where it is impossible to establish communication between particular persons:

(1) When the order is to establish communication with a particular person in a given city, telephone address unknown, and the particular person can not be secured within one hour (exclusive of any time during which "no circuits" or other cause prevent communication of the order to the distant city or exchange, or its completion).

(2) When the designated person called refuses to talk.

(3) When the report is returned that the designated person called is "out" or "out and will return at (specified time)," or "out and time of return unknown," "is absent from the city," and similar reports advising the calling subscriber of the facts ascertained when failure to complete the order is due solely to the circumstances of the called person or to fault in describing the location of the called person, and when all of the work preliminary to establishing communication with the called person is done.

(4) When communication between the designated persons can not be established because the designated person at the calling station is absent at the calling station; provided that no charge shall be made

in such cases where the delay, if any, in establishing connection is greater than one hour.

(5) When the designated person at the calling station refuses to talk when the facilities for communication have been established.

3. Appointment Calls.—Appointment calls are person-to-person calls, the order for which provides that communication is to be arranged for to take place as a specified time.

4. Messenger Calls.—Messenger calls are person-to-person calls requiring the use of a messenger to secure attendance of a designated person at one of the public pay stations at the distant point.

[fol. 86] 5. Collect Calls.—Collect calls are person-to-person calls, the charges for which are "reversed," i. e., to be collected from the subscriber of the distant station at which the call is to be completed.

II. Toll Rates for Intrastate Station-to-station Messages

Effective 12.01 A. M., —— 21, 1922, the following initial period rates are established for toll messages where the distance between exchanges, or toll points, does not exceed 40 miles by direct measurement on a U. S. Government Post Route Map.

For distance more than	But not more than	Initial rate
0 Miles	12 Miles	$0.10
12 "	18 "	.15
18 "	24 "	.20
24 "	32 "	.25
32 "	40 "	.30

The following initial period rates are established for station-to-station toll messages for all distances in excess of 40 miles by direct air line measurement:

For distance more than	But not more than	Initial rate
40 Miles	48 Miles	$0.35
48 "	56 "	.40

For each additional 8 miles or fraction thereof, 5 cents additional.

For the purpose of applying standard rates where the direct air line distance between points is in excess of 40 miles, distance shall be determined as the air line distance between the centers of blocks 7 miles square, within which the points of communication are located, and where the distance is in excess of 350 miles by the air line distance between the centers of sections 35 miles square.

The block and section scaling system for purposes of measuring toll rate distance between points more than 40 miles distant by direct

measurement, shall consist of a grid containing sections 35 miles square, each section subdivided into 25 blocks seven miles square, so placed on a polyconic projection of a Government survey map of the United States that section lines coincide with a line drawn approximately north and south through the center of the United States and with a line at right angles thereto passing through the northwestern point of the International boundary line in the Strait of Georgia.

III. Toll Rates for Other Classes of Toll Calls

Effective 12:01 A. M., —— 21, 1922, the following toll message rates are established for person-to-person calls, appointment calls, and messenger calls:

[fol. 87] 1. The initial period rates for person-to-person calls shall be approximately 25 per cent in addition to the station-to-station rates between the same points, in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls, attached hereto, but no person-to-person rate shall be less than 15 cents.

2. In those cases where person-to-person calls are not completed and a report is made or the conditions are such as described in paragraph I, 2 (c) of this schedule a report charge shall be made of approximately one-fourth the initial rate for station-to-station messages between the same points, in accordance with schedule of Computed Rates for Person-to-Person, Appointments and Messenger Toll Calls, attached hereto and hereby made a part of this schedule; but no report charge shall be less than 5 cents for any one call, nor more than $2.00.

3. The rates for appointment calls shall be approximately 50 per cent in addition to the rates for station-to-station messages between the same points in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Call, hereto attached and hereby made a part of this schedule; but in the case of an appointment call order, where the distant station is reached, whether the appointment be made or not, the Report Charge applicable in case of person-to-person calls between the same points shall be made.

4. The rates for messenger calls shall be the same as applied to appointment calls, between the same points, plus any charges that may be required for the service of messengers.

IV. Standard Toll Night Rates

Effective 12:01 A. M., —— 21, 1922, the following reductions shall be effective in the rates and charges for station-to-station messages only, between the hours of 8:30 P. M. and 4:30 A. M.

1. Between the hours of 8:30 P. M. and 12 midnight, the night rates for station-to-station messages shall be approximately 50 per cent

less than the regular day rates, in accordance with the Schedule of Computed Night Rates attached hereto and hereby made a part of this schedule, but no night rate shall be less than 25 cents.

2. Between the hours of 12 midnight and 4:30 A. M., the night rates shall be approximately 75 per cent less than the established day rates, in accordance with the Schedule of Computed Night Rates attached hereto, and hereby made a part of this schedule; but no night rate shall be less than 25 cents.

3. For the purpose of applying night rates, the time of day at the point at which a station-to-station message originates shall be used.

4. Day rates only shall be employed between the hours of 4:30 A. M. and 8:30 P. M.

[fol. 88] V. Initial Period, Overtime Periods, and Overtime Rates

Effective 12:01 A. M., —— 21, 1922, the following initial periods, overtime periods and overtime rates are established:

Classification	Initial period	Overtime period
Station-Station	3 minutes	1 minute
Person-Person	2 minutes	1 minute
Messenger and appointment	2 minutes	1 minute

The overtime rates shall be—

Station-to-station:

Where the initial rate is	Overtime rate per period
*$0.15	$0.05
.15	.05
.20	.05
.25	.05
.30	.10
.35	.10
.40	.10
.45	.15

and thereafter approximately one-third of initial rate and in no case more than one-third of the initial rate.

Person-to-person and Messenger and Appointment

Where the initial rate is	Overtime rate per period
$0.15	$0.05
.20	.10
.25	.10
.30	.15
.35	.15
.40	.20
.45	.20

and thereafter approximately one-half of the initial rate and in no case more than one-half of the initial rate.

*Minimum Messenger and Appointment Rate $0.20.

[fol. 89] Schedule of Computed Rates for Person-to-Person Appointment and Messenger Toll Calls

When the station-to-station day rate is	The completed person-to-person rate is	The completed appointment and messenger rate is	The report charge is
$0.10	$0.15	$0.20	$0.05
.15	.20	.25	.10
.20	.25	.30	.10
.25	.30	.35	.10
.30	.40	.45	.10
.35	.45	.50	.10
.40	.50	.60	.10
.45	.55	.65	.15
.50	.60	.75	.15
.55	.65	.80	.15
.60	.75	.90	.15
.65	.80	.95	.20
.70	.85	1.05	.20
.75	.90	1.10	.20
.80	1.00	1.20	.20
.85	1.05	1.25	.25
.90	1.10	1.35	.25
.95	1.15	1.40	.25
1.00	1.25	1.50	.25
1.05	1.30	1.55	.30
1.10	1.35	1.65	.30
1.15	1.40	1.70	.30
1.20	1.50	1.80	.30
1.25	1.55	1.85	.35
1.30	1.60	1.95	.35
1.35	1.65	2.00	.35
1.40	1.75	2.10	.35
1.45	1.80	2.15	.40
1.50	1.85	2.25	.40
1.55	1.90	2.30	.40
1.60	2.00	2.40	.40
1.65	2.05	2.45	.45
1.70	2.10	2.55	.45
1.75	2.15	2.60	.45
1.80	2.25	2.70	.45
1.85	2.30	2.75	.50
1.90	2.35	2.85	.50
1.95	2.40	2.90	.50
2.00	2.50	3.00	.50
And thereafter increasing in 5 cent steps.	And thereafter 25% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, 25% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter 50% in addition to the Station-to-Station day rate. When the Station - to - Station day rate is not evenly divisible by 2, 50% in addition to the Station - to - Station day rate, computed to the next lower multiple of 5 cents.	And thereafter one-fourth the Station - to - Station day rate. When the Station - to - Station day rate is not evenly divisible by 4, one-fourth the Station - to - Station day rate computed to the next higher multiple of 5 cents; but no Report Charge will exceed $2.00.

[fol. 90] Schedule of Computed Night Rates for Station-to-Station Toll Messages

When the day rate is	The rate between 8:30 p. m. and 12:00 midnight is	The rate between 12 midnight and 4:30 a. m. is
$.10	Day Rate	Day Rate
.15	" "	" "
.20	" "	" "
.25	" "	" "
.30	$.25	$.25
.35	.25	.25
.40	.25	.25
.45	.25	.25
.50	.25	.25
.55	.30	.25
.60	.30	.25
.65	.35	.25
.70	.35	.25
.75	.40	.25
.80	.40	.25
.85	.45	.25
.90	.45	.25
.95	.50	.25
1.00	.50	.25
1.05	.55	.30
1.10	.55	.30
1.15	.60	.30
1.20	.60	.30
1.25	.65	.35
1.30	.65	.35
1.35	.70	.35
1.40	.70	.35
1.45	.75	.40
1.50	.75	.40
1.55	.80	.40
1.60	.80	.40
1.65	.85	.45
1.70	.85	.45
1.75	.90	.45
1.80	.90	.45
1.85	.95	.50
1.90	.95	.50
1.95	1.00	.50
2.00	1.00	.50
And thereafter increasing in 5 cent steps.	And thereafter one-half the day rate. When the day rate is not evenly divisible by 2, one-half the day rate computed to the next higher multiple of 5 cents.	And thereafter one-fourth the day rate. When the day rate is not evenly divisible by 4, one-fourth the day rate computed to the next higher multiple of 5 cents.

[File endorsement omitted.]

[fol. 91] UNITED STATES OF AMERICA:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

In Equity

No. 166-E

SUBPŒNA AND RETURN—Filed Apr. 26, 1923

The President of the United States of America to E. V. Kuykendall, as Director of Public Works of Washington; Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the person constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, Defendants, Greeting:

You are hereby commanded, That you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of — on the 14th day of May, 1923 to answer a Bill of Complaint filed against you in said Court by The Pacific Telephone and Telegraph Company, a Corporation and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of the law.

Witness the Honorable Edward E. Cushman, Judge of said Court, and the seal thereof, at Tacoma, Washington, this 24th day of April, 1923.

—— ——, Clerk, By Alice Huggins, Deputy Clerk. (Seal U. S. Court.)

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

—— ——, Clerk, By Alice Huggins, Deputy Clerk. (Seal U. S. Court.)

RETURN ON SERVICE OF WRIT

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Subpœna in Equity on the therein-named E. V. Kuyendall, as Director of Public Works of Washington, by handing to and leaving a true and correct copy thereof with Frank R. Spinning, Supervisor of Transportation of Washington, at his usual place of business personally

at Olympia, Washington in said District on the 25th day of April, A. D. 1923.

E. B. Benn, U. S. Marshal, By John T. Secrist, Deputy.

[fol. 92] UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify, That I have served the within writ by delivering to and leaving a true copy thereof with Hance H. Cleland, as Supervisor of Public Utilities of Washington, Frank R. Spinning as Supervisor of Transportation of Washington, and John H. Dunbarr, as Attorney General of Washington, at Olympia, Washington.

E. B. Benn, United States Marshal, By John T. Secrist, Deputy. April 25, 1923. Fees: 10.68.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER—Filed Apr. 28, 1923

This matter coming on for hearing before the Honorable Edward E. Cushman, Judge of the above named court on the motion of the above named plaintiff for a temporary restraining order, restraining the defendants, and each of them, and all other persons from attempting to compel the plaintiff, its officers, agents and employees, to observe, maintain or keep in force the rates and charges now prescribed by the Department of Public Works of Washington, as set forth in Schedule "Exhibit A" referred to in the bill of complaint and filed therewith, and from attempting to interfere with or prevent the plaintiff, its directors, officers, agents and employees, from immediately putting into effect the rates and charges set forth in schedule "Exhibit F" referred to in the bill of complaint and filed therewith, and from taking any steps or proceedings against the plaintiff, its directors, officers, agents, or employees, to enforce any penalty or remedy against the plaintiff, its directors, officers, agents or employees, for disregarding the rates and charges set forth in said schedule "Exhibit A," or from putting into effect any rates or charges not in excess of those set forth in said schedule "Exhibit F," and that an order to show cause herein, upon the application of the plaintiff herein, directed to the above named defendants, and each of them, requiring them, and each of them, to show cause why a temporary injunction should not issue as prayed for in the bill of complaint heretofore filed herein, and it being necessary that notice of said application for said temporary injunction be given before said application shall be heard and determined to not only all of the defendants named herein, but to the Governor of the State of Washington as well; It is therefore, ordered that the defendants, and each of them, be and appear before the above named court in the District

Court of the United States in and for the Western District of Washington, Southern Division, sitting at Tacoma, in said District on the [fol. 93] 30th day of April, 1923, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as a court constituted as provided by Section 266 of the Judicial Code of the United States can be convened, then and there to show cause, if any they have, why they, and each of them, should not be enjoined and restrained in the manner hereinbefore stated.

It further appearing to the court that immediate and irreparable loss and damage will result to the plaintiff unless a temporary restraining order is granted, it is ordered that until a hearing of this show cause order and determination thereof, the defendants, and each of them, and all other persons, are restrained from attempting to compel the plaintiffs, its officers, agents and employees, to observe maintain and keep in force the rates and charges now prescribed by the Department of Public Works of Washington, as set forth in schedule "Exhibit A" referred to in the bill of complaint and filed therewith, and from attempting to interfere with or prevent the plaintiff, its directors, officers, agents, or employees from immediately puiting into effect the rates and charges set forth in schedule "Exhibit F" referred to in the bill of complaint and filed therewith, and from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees to enforce any penalty or remedy against the plaintiff, its directors, officers, agents, or employees for disregarding the rates and charges set forth in said schedule "Exhibit A" and from putting into effect any rates or charges not in excess of those set forth in said schedule "Exhibit F."

And it is further ordered by the court that a copy of this order be served at least five (5) days before said 30 day of April, 1923, upon each and every of the defendants above named, including the Attorney General, and also upon the Governor of the State of Washington.

And it is further ordered that this order shall become effective upon the plaintiff company giving a bond in the sum of $175,000.00 to be approved by the court, conditioned to reimburse subscribers the excess over the rates set forth in "Exhibit A" in case it is finally determined that the increase in rates hereby authorized ought not to have been authorized; and it is further ordered that until the further order of this court, the plaintiff company shall keep its accounts in such a way that said excess due to the rates made effective by this order and paid by each subscriber, can be readily and accurately ascertained.

And it is further ordered that the plaintiff shall file with the Clerk of the above named court, conveniently after the first day of each month, a statement of the amount collected from each of its subscribers, together with a statement of the amount that would have been collected had the rates set forth in "Exhibit A" been in force, and that when a final decree is entered, if it shall be determined that the rates set forth in "Exhibit A" should have been continued in effect by the plaintiff, then and in that event the difference between the rates set forth in "Exhibit A" and the rates collected, shall be

paid to a special master, to be appointed by this court, and by the special master distributed to the various persons entitled to receive [fol. 94] the same; and that in the event that a final decree is entered, adjudicating that the rates set forth in "Exhibit A" should have been continued in effect by the plaintiff, and the plaintiff should fail to pay to the special master the difference between the rates set forth in "Exhibit A" and the rates collected, then the special master, appointed by this court, may institute suit on the bond in behalf of all the subscribers, to recover the amounts to which they, respectively, may be entitled.

Done in open court this 24th day of April, 1923.

Edward E. Cushman, Judge.

I hereby certify that I received the annexed Restraining Order and Order to Show Cause on the 25th day of April, 1923, and thereafter on the same date, I served E. V. Kuykendall as Director of Public Utilities of the State of Washington and Hance H. Cleland as Supervisor of Public Utilities, by delivering to and leaving with J. H. Brown, Secretary of the Department of Public Works at Olympia, two certified copies of this Order. Thereafter on the same date, I served Frank R. S. Spinning, Supervisor of Transportation of the State of Washington, John H. Dunbar, Attorney General of the — Washington, by delivering to and leaving with them a certified copy of this Order.

E. B. Benn, U. S. Marshal, By E. E. Gaskell, Deputy.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. E. FLEAGER—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, C. E. Fleager, being first duly sworn, depose and say: That I reside in Berkeley, California, and am forty-three years of age; I have been employed in the telephone business for twenty-three years and by The Pacific Telephone and Telegraph Company and its predecessors for twenty-one years; I am Assistant Vice-President of plaintiff company and during my experience with said company have had responsible charge of general engineering matters running to the design and construction of toll and exchange lines, fundamental engineering plans, inventory and appraisal work and similar general engineering matters; I am familiar with telephone properties and with the work, labor and material entering into the con-

struction of the same and with the units of cost thereof and in the regular course of my employment I have engaged at different times [fol. 95] in making appraisals of telephone property situated in the States of Idaho, Washington, Oregon, California and Nevada, the aggregate values of such run over one hundred millions of dollars, and during the last nine years I have been giving particular attention to the analysis of all costs incurred by telephone companies in all work of construction performed by them.

I am thoroughly familiar with the entire property belonging to the plaintiff company in the State of Washington and devoted by it to the furnishing of intrastate telephone service in said state and for some years past have had responsible charge of inventory and appraisal work in connection with that property; that for several months I have been employed with a force under my direction in making an appraisal of said property and in the course of such employment I have made a valuation as of the present time, of all of the property used or useful by the plaintiff company in the rendition of its telephone service in the State of Washington.

In arriving at the present fair value of the property of plaintiff hereinafter stated I have taken into consideration among other things, the following facts and matters:

(a) The cost of said property as evidenced by the affidavit of C. T. Blanck, filed herein, is the sum of $29,347,254 as of December 31, 1922, for the entire property in the state; (excluding Spokane); for the property in the Seattle Exchange the sum of $17,023,372 and the property in the Tacoma Exchange the sum of $2,888,021, and the fact that said cost includes the cost of a large amount of property, approximately fifty per cent of the total, which was constructed prior to the year 1915 before the increases in labor and material costs due to conditions prevailing during and since the World War became operative.

(b) The amount on the books for said property being the sum of $30,009,059 for the property in the State of Washington (excluding Spokane); the sum of $17,344,047 for the property in the Seattle Exchange and the sum of $3,009,769 for the property in the Tacoma Exchange, all as of December 31, 1922.

(c) The cost of reproduction new of said property. By using the actual units of property making up the said plant used or useful and devoted exclusively to the rendition of telephone service by the plaintiff in the State of Washington and applying thereto prices of labor and material proper as of this time, I have determined the cost of reproduction of said property to be, as of December 31, 1922, the sum of $48,087,785 for the State of Washington (excluding Spokane); the sum of $27,149,130 for the Exchange of Seattle and the sum of $4,998,964 for the Exchange of Tacoma. This value includes a reasonable allowance for working capital, materials and supplies and for the item usually called going concern value. In ascertaining the cost of reproduction new, above stated, I have used prices which I regard as applicable and which are considerably

lower than the prices prevailing during and since the World War. Had I used the peak prices prevailing during and since the World War the cost of reproduction new of said property would have been [fol. 96] a sum in excess of $55,000,000 for the State of Washington (excluding Spokane); $31,000,000 for the Seattle Exchange and $5,700,000 for the Tacoma Exchange.

(d) Said telephone property of the plaintiff is and has been, at all times of my employment with the plaintiff company, in a 100 per cent service condition and I have, from time to time, observed and caused to be observed, inspected and examined said property and parts thereof and, in a general way, am familiar personally with the present condition of said property. I have taken into consideration, in arriving at the present fair value of said property, such depreciation in the property as actually exists and have determined that the cost of reproduction of said property less depreciation as of the thirty-first day of December, 1922, for the State of Washington (excluding Spokane); is the sum of $43,962,085; for the Exchange of Seattle the sum of $24,919,930 and for the Exchange of Tacoma the sum of $4,534,264.

(e) Appraisals made of the land owned by the plaintiff throughout the State of Washington, as determined from time to time by disinterested appraisers familiar with real estate values in the various localities in which said parcels of land are located.

(f) Based upon my experience in examining and appraising the properties and operations of the plaintiff company and my knowledge of plaintiff's actual requirements over several years for working capital and material and supplies necessary in the rendition of telephone service in the State of Washington, I have estimated the amount reasonably required by plaintiff (excluding Spokane) for such purposes at not less than $1,013,100.

After giving careful consideration to all of plaintiff's property, its history, location and character, and to the factor usually called going concern value, and all facts and matters above enumerated and all other factors within my knowledge affecting its value, it is my opinion that the present fair value of the entire property of the plaintiff used or useful and devoted by it to furnishing telephone service in the State of Washington (excluding Spokane) as of December 31, 1922, is in excess of the sum of $35,616,896; for the Exchange of Seattle in excess of the sum of $20,852,067 and for the Exchange of Tacoma in excess of the sum of $3,457,290.

I further say that in arriving at such present fair value I have made no allowance for the value of any of plaintiff's franchises or rights to own or operate a telephone system in the State of Washington or any of its municipalities.

C. E. Fleager.

Subscribed and sworn to before me this 19th day of April, 1923. Frank I. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 97] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. T. BLANCK AS TO COST OF CONSTRUCTION PROPERTY—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. T. Blanck, being first duly sworn, deposes and says: That he resides in the City of Berkeley, State of California; that he is thirty-six (36) years of age, and, in the year 1902 was first employed in telephone engineering, construction and maintenance work by The Pacific Telephone and Telegraph Company, and its predecessors, and was continuously employed by the Company until the end of the year 1917 when he entered the United States Army as commissioned officer in the Signal Corps and upon his return from France upon completion of his military service, late in the year 1919, re-entered the employ of The Pacific Telephone and Telegraph Company and he has since been employed continuously by the plaintiff company in general engineering and appraisal work.

That he is thoroughly familiar with telephone properties and with the cost of labor and materials entering into the construction of same and with the units of cost thereof, and in the regular course of his employment he has engaged in making appraisals of telephone properties situated in the States of Washington, Idaho, Oregon, California and Nevada, and in France, the aggregate value of which runs into more than one hundred millions of dollars and, during the last sixteen or seventeen years, he has given particular attention to the analysis of all costs incurred by telephone companies in all work of construction performed by them.

That he is thoroughly familiar with the entire property belonging to the plaintiff company in the State of Washington and devoted by it to the furnishing of telephone service in said State.

That in arriving at the cost to plaintiff of its property in the State of Washington, he has taken into consideration, among other things, the following facts and matters:

(a) The exhaustive inventory and appraisal of said property as of December 31, 1913. This appraisal was made on the basis of actual performance applied to the items of property as inventoried,

with the exception of the item "Land," which was included therein at the then market value, determined by disinterested appraisers familiar with real estate valuation in the various localities in which the parcels of such lands and buildings were located. This actual performance basis was determined from the costs as shown by the official records of the Company which were and are kept in accordance with the system of accounting for telephone companies prescribed by the Interstate Commerce Commission in its circular en- [fol. 98] titled "Uniform System of Accounts for Telephone Companies" and which system was adopted by the Public Service Commission, now the Department of Public Works of the State of Washington.

This inventory and appraisal was exhaustively check by engineers of the Public Service Commission and was found by them to be substantially correct. This inventory and appraisal was presented in formal hearing before the Public Service Commission of the State of Washington on January 24, 1916, in Case No. 1810, before said Commission, and identified in the records of that case as Company Exhibit No. 1, Vols. 1-24, inclusive, and Exhibit No. 4, Vols. 25-53, respectively.

(b) The additions and betterments to said property during the period December 31, 1913, to December 31, 1922. The additions and betterments, or "Net Additions," are taken from the official records of the Company and represent the literal facts taken from reports of actual daily operations in accordance with the principles established in the accounting methods prescribed by the Interstate Commerce Commission and the Public Service Commission, now the Department of Public Works of the State of Washington.

(c) The amount on the books of plaintiff for Fixed Capital (excluding Intangible Capital) and Working Assets as of December 31, 1922. This is the sum of $30,009,059, for the property in the State of Washington; sum of $17,344,047 for the Seattle Exchange; and, the sum of $3,009,769 for the Tacoma Exchange, all as of December 31, 1922.

That adding the additions and betterments to the actual performance appraisal as of December 31, 1913, the cost to plaintiff of its property in the State of Washington (not including Spokane, that being the property of The Home Telephone and Telegraph Company of Spokane and Land being included at present value), as of December 31, 1922, was the sum of $29,347,254, including therein the sum of $1,013,122 for Working Capital and Materials and Supplies; that the cost to plaintiff of its property in its Seattle Exchange (Land being included at present value) amounts to the sum of $17,023,372, included therein being the sum of $709,509 for Working Capital and Materials and Supplies; that the cost of its property in its Tacoma Exchange (Land being included at present value) amounts to the sum of $2,888,021, included therein being the sum of $131,646 for Working Capital and Materials and Supplies.

That the cost of the property of plaintiff so found herein is substantially the same as the value for rate making purposes fixed by the Department of Public Works in their Findings of Fact, Order and Opinion in Cause, Case 5344, as of June 30, 1922, plus actual additions and betterments to December 31, 1922.

That the cost of the property of plaintiff so found herein is less than the amount on the books of plaintiff for said property.

C. T. Blanck.

[fol. 99] Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF J. C. NOWELL—Filed Apr. 24, 1923.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. C. Nowell, being first duly sworn, deposes and says that he is the Vice-President and General Manager of the plaintiff, The Pacific Telephone and Telegraph Company, and resides at Hillsborough, California. That he was graduated from the Massachusetts Institute of Technology in the year 1894 with the degree of Bachelor of Science. That he has been in the telephone business for twenty-nine years continuously; that he was first employed as Inspector by the American Telephone and Telegraph Company; that he was employed in the Plant Department of the Bell Telephone Company of Philadelphia and its successor, the Bell Telephone Company of Pennsylvania, from 1895 to 1913, successively as Supervisor, Superintendent of Maintenance, Engineer and General Superintendent of plant. That on or about March 14, 1913, he became General Manager of plaintiff, and afterwards and on or about August 6, 1919, he became Vice-President and General Manager thereof, which position he still holds.

That ever since he became General Manager he has had, and still has, general charge of the operating departments of plaintiff; that he is thoroughly familiar with all branches of its business and with its methods of conducting same, and with all of its plant and property. That the plaintiff owns and operates telephone and telegraph lines and exchanges and conducts a public telephone and telegraph business in the States of Washington, Oregon, California, Nevada and Idaho. That the plaintiff furnishes exchange service and also

toll service. That it had on December 31, 1922, in its entire system, 708 central offices or exchanges; that of said central offices 122 are within the State of Washington outside of the Spokane Exchange, and six in the Spokane Exchange, the exchange last mentioned being the property of The Home Telephone and Telegraph Company of Spokane, all of the capital stock of which is owned by plaintiff.

That plaintiff is now operating in its entire system upwards of 917,000 telephones, or as they are commonly referred to in the tele-
[fol. 100] phone business, "stations." That of said number of stations upwards of 141,000 are in the State of Washington outside the Spokane Exchange, and upwards of 31,700 in the exchange last named. That the number of stations operated by the plaintiff is growing continually and the estimated growth in the number of stations during the year 1923 in the State of Washington is upwards of 8% of the stations now in service, or in other words, approximately 11,400 stations will be added to the plaintiff's system in that state during the year, not including Spokane, and 2,100 stations in the Spokane Exchange.

That the plaintiff has in the State of Washington more than 116,000 subscribers' accounts, of which more than 56,000 are for Seattle subscribers and more than 16,000 for Tacoma subscribers; that there are more than 22,000 subscribers' accounts for Spokane. That between December 31, 1912, and December 31, 1922, the number of stations operated by the plaintiff in the State of Washington, outside of Spokane, has increased from 83,300 to upwards of 141,000 and in Spokane from 21,411 to upwards of 31,700.

That the 12 central offices in Seattle three have machine switching and nine have manual equipment. Of the manual central offices three are to be replaced by machine switching during 1923 or early in 1924.

That the Department of Public Works in its majority opinion of March 31, 1923, has quoted from a paper read before the American Institute of Electrical Engineers in 1919, and draws from this paper the conclusion: "We must therefore conclude that the installation of the machine switching device in Seattle will, on the whole, reduce the Company's expenses and our conclusion and order in this case will be made with that assumption in view." That in the judgment of Affiant the Department of Public Works is no more warranted in applying to Seattle a conclusion drawn by them from said article than they would be warranted in deducing from the fact that because a certain number of bushels of grain per acre might be grown in the Palouse country, that therefore the same or any fixed number of bushels of grain per acre could be grown in Thurston County, Washington, for the reason that the applicability or otherwise of any results experienced in the exchanges upon which said paper was based, would depend entirely upon whether the factors and conditions existing in those exchanges existed in Seattle. That with reference to the exchanges cited by the Department, it is patent upon the face of the record, i. e., the article relied upon by

them, that the data referred to comprises only operating expenses and is cited without reference to total results inclusive of carrying charges upon total investment, which omission makes impossible a conclusion in Seattle based upon the incomplete results recited in the article. On the other hand, the conditions in Seattle are well known and have been completely and thoroughly investigated by the Department's engineering force. Affiant asserts that the machine switching installation at Seattle partially replacing at this time manual equipment, does not effect immediate economies in the total operations involved in giving telephone service to the people of the City of [fol. 101] Seattle now nor will it for the next several years. That in spite of this fact the installation of machine switching equipment in Seattle was warranted by the following considerations: that experience in general industry shows that whenever machine operation is sufficiently developed to insure satisfactory production at costs that are no higher than for manual operation, the substitution should be made. That this practice has been consistently followed in developing the telephone business and now a large part of the work is done by machinery that was formerly done by hand. That machine methods offer a wide field for additional improvements which will help to cut down the constant increase in operating costs in large cities caused by the growth in stations and calls to be handled requiring the installation of more expensive cable plant and central office equipment, not only for connecting new subscribers to the central offices, but also required to handle the ever increasing calls from subscribers connected with one central office, for subscribers connected with a distant central office; that machine operation also provides means for furnishing more speedy and satisfactory service on such calls than does manual equipment.

That the machine switching equipment installed in Seattle is of a type known to be capable of meeting the traffic and service conditions inhering in the Seattle Exchange at this time, and known to be capable of satisfactorily and economically caring for the expansion of stations and traffic with the growth of the city. That the equipment has other immediate advantages, several of which were referred to in the majority order, namely:

1. Speed of connection and disconnection.
2. Ease of obtaining connection and disconnection.
3. Accuracy of connection.
4. Voice transmission.
5. Secrecy.
6. The elimination of such faults inherent in manual operation as—
   (1) Fluctation of service.
   (2) Impairment of service by epidemics, strikes, etc.
   (3) Mistranslation of calling subscribers' desires.

That on the 22nd day of September, 1919, Cause No. 4902 was brought by the Public Service Commission of Washington against plaintiff, alleging inadequacy of facilities and service properly to

meet the requirements of the people of Seattle. That at the hearing of said cause the plans of plaintiff for changes in its method of operation and additions to plant requisite to meet the situation, including the installation of machine switching equipment, were developed before the Commission. That the expenditures of plaintiff during 1920, 1921 and 1922 in the City of Seattle were largely [fol. 102] controlled by the plans developed at the hearing in said cause which was not dismissed until in the order of March 31, 1923.

That the plant and property of plaintiff are at all times kept in first class condition by making necessary repairs and renewals so that from an operating and service standpoint all of the plant and property in its entire system are kept in a high state of operating efficiency.

That the business of plaintiff requires large amounts of new capital continually because of the continual growth of the business and because of its character; that as new subscribers or users of the service are added to the system it is necessary to install new telephones, equipment and wires running from the place where the telephone station is located to the central office from which the telephones are served. That as the capacity of the switchboards of the plaintiff is filled up, the installation of additional switchboards, apparatus and equipment, the rearrangement of central offices, the acquisition of additional real estate and the construction of new buildings are required, the total cost of which runs into great sums of money. That the actual net expenditures made by plaintiff for additional property and construction during the years 1921 and 1922 in the State of Washington (excluding Spokane) and for Seattle and Tacoma were as follows:

	Year 1921	Year 1922
State of Washington	$4,660,520.00	$4,389,063.00
Seattle	4,027,238.00	3,495,421.00
Tacoma	69,819.00	86,818.00

That the following amounts are planned to be expended by plaintiff for additional property and construction for the State of Washington (excluding Spokane), and for Seattle and Tacoma during the years 1923 and 1924:

	Year 1923	Year 1924
State of Washington	$4,384,000.00	$3,000,000.00
Seattle	2,560,000.00	1,200,000.00
Tacoma	286,000.00	300,000.00

That since becoming General Manager of plaintiff in the year 1913 one of Affiant's chief duties has been to supervise and examine into the operating expenses of the plaintiff and he has made every effort during all of the time since that date to effect as many economies as possible and to keep the operating expenses at as low a level as is consistent with the maintenance of the plant and the furnishing of good service. That in the opinion of affiant the operating expenses of plaintiff at the present time are and during the past have been fair and reasonable.

Affiant asserts that it appears upon the face of the order made by the Department on March 31, 1923, that the return of 6.01% which the Department claims the plaintiff company would realize under the rates approved in said order, must be reduced by the amount of the income tax based upon the results of the rates specified in said order, payable for the year 1923 by the plaintiff company [fol. 103] for the plaintiff system in the State of Washington, for the reason that although the Department stated that said income tax should be included as an expense before reaching a net upon which to figure a per cent return, which income tax in fact to the amount of more than $95,000.00 was included in the computation made in the order, nevertheless said amount was omitted in the calculation used in arriving at the return of 6.01%. In fact the correction of this, without considering other mathematical errors made by the Department in the majority order which would further reduce the indicated return to plaintiff, would on the basis used by the Department, develop a return of only 5.74% instead of 6.01%.

That Affiant is familiar with the contract between plaintiff and the American Telephone and Telegraph Company, referred to in the order of the Department of March 31, 1923, as the "4½% of contract," and in particular Affiant is familiar with the services rendered by said American Company to plaintiff under said contract. That the telephone service as rendered by plaintiff at this time could not be rendered without the facilities and services furnished by the American Company under said contract. That such services and equipment are not available to the Pacific Company from any other source. That in consequence, the payment by plaintiff of the sum of $388,365.00 for the year 1922 made in payment of such services, and the corresponding amount due and payable under said contract from the revenues of 1923 were and are inescapable. That said services and the equipment furnished in conjunction therewith are and will be worth to plaintiff in excess of the amount paid and payable to the American Company under said contract. That said services can not be secured for the payment of $161,653.00, the amount arbitrarily set up by the Department for the year 1923, and that the return of 5.74% disclosed by the above correction of the Department's calculation, would for this reason alone, be reduced by the difference between said amount and the amount payable under the contract, and that this difference for the revenues set out in the majority opinion, for the year 1923 is the sum of $226,347.00.

That in addition to the corrections noted above, the expense for depreciation to be met by plaintiff from its revenues from its system in the State of Washington, as set out in the affidavit of C. E. Fleager, will be upwards of $600,000 in excess of the amount figured by the Department. That with the correction of the errors noted and with the 4½% payment and expense for depreciation herein set forth, the rates fixed in the majority order of the Department will give a rate of return to plaintiff from its operations in the State of Washington of not more than 3.35% on the value for rate making purposes

fixed by the Department, and of not more than 2.75% on the fair value of plaintiff's property in the State of Washington.

J. C. Nowell.

[fol. 104] Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. S. CASASSA—Filed April 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. S. Casassa, being duly sworn, deposes and says: That he resides in San Francisco, California. That he was first employed in the telephone business in 1897 by the predecessor of The Pacific Telephone and Telegraph Company in the Accounting Department, and has ever since been and is now in the employ of said company in its Accounting Department. That since April, 1912, he has held the position of Auditor of Disbursements, and since July, 1922, in the absence, on account of illness, of the General Auditor, has been Acting General Auditor of said company, and as such has had complete charge of all its accounts and accounting systems, and is thoroughly familiar with the same.

That the accounts of the plaintiff are and have been since January 1, 1913, kept in accordance with accounting regulations prescribed by the Interstate Commerce Commission and adopted by the Public Service Commission of Washington, now the Department of Public Works of Washington.

That the statements as to costs hereinafter set out contain nothing on account of franchises or on account of the item known as going concern value.

1919

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service in the State of Washington (not including Spokane) during the year 1919 amounted to 4.97 per cent; for its Seattle Exchange, 3.97 per cent, and for its Tacoma Exchange, .98 per cent, of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operations for 1919 is as follows:

[fol. 105] Average Cost of Property

	Sate of Washington	Seattle	Tacoma
Average Plant and Equip..	$16,853,149	$7,262,230	$2,505,850
Average Working Assets..	865,027	502,197	168,215
Total	$17,718,176	$7,764,427	$2,674,065

Telephone Revenues

	Sate of Washington	Seattle	Tacoma
Exchange Service.....	$4,080,851	$2,521,732	$632,616
Toll Service	1,496,650	131,542	47,981
Miscellaneous	111,746	67,129	18,233
Total Tel. Rev. ...	$5,689,247	$2,720,403	$698,830

Telephone Expenses

	Sate of Washington	Seattle	Tacoma
Current Maintenance.....	$926,226	$429,988	$107,365
Deprec. & Amortization...	951,580	404,431	146,249
Traffic	1,731,529	1,008,858	242,323
Commercial	451,390	216,922	70,845
Gen. and Misc.	127,973	54,284	14,129
Uncollectible Opr. Rev....	19,037	10,071	3,898
Taxes	320,114	151,199	58,091
Rent Deductions	48,992	23,133	570
Licensee Con. Exprs.	232,194	113,156	29,022
Total Tel. Exps. ..	$4,809,035	$2,412,042	$672,492
Net Tel. Rev.	$880,212	$308,361	$26,338
Per Cent Net Rev	4.97%	3.97%	.98%

1920

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service in the State of Washington (not including Spokane) during the year 1920 amounted to 4.42 per cent; for its Seattle Exchange, 1.85 per cent, and for its Tacoma Exchange, .89 per cent, of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operations for 1920 is as follows:

[fol. 106] Average Cost of Property

	Sate of Washington	Seattle	Tacoma
Aver. Plant & Equip.....	$18,308,353	$8,189,216	$2,560,603
Average Working Assets..	859,853	517,584	154,930
Total	$19,168,206	$8,706,800	$2,715,533

Telephone Revenues

	Sate of Washington	Seattle	Tacoma
Exchange Service	$4,720,104	$2,954,291	$706,066
Toll Service	1,770,351	154,496	51,537
Miscellaneous	165,524	112,673	23,637
Total Tel. Rev.	$6,655,979	$3,221,460	$781,240

Telephone Expenses

	Sate of Washington	Seattle	Tacoma
Current Maintenance.....	$1,203,122	$604,521	$127,385
Deprec. & Amortization...	1,007,652	449,841	153,050
Traffic	2,063,147	1,262,851	260,892
Commercial	508,198	254,804	74,224
Gen. and Misc.	150,925	62,675	15,783
Uncollectible Opr. Rev. ..	15,521	9,988	1,935
Taxes	524,811	252,152	89,049
Rent Deduction	55,601	26,108	1,202
Licensee Con. Exps.	280,262	137,328	33,527
Total Tel. Exps. ...	$5,809,239	$3,060,268	$757,047
Net Tel. Rev.	$846,740	$161,192	$24,193
Per Cent Net Rev.	4.42%	1.85%	.89%

1921

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service in the State of Washington (not including Spokane) during the year 1921, amounted to 3.30 per cent, for its Seattle Exchange, .69 per cent, and for its Tacoma Exchange, .58 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operations for 1921 is as follows:

[fol. 107] Average Cost of Property

	Sate of Washington	Seattle	Tacoma
Average Plant and Equip...	$21,614,809	$10,804,927	$2,634,648
Aver. Working Assets.....	905,017	608,326	129,566
Total	$22,519,826	$11,413,253	$2,764,214

Telephone Revenues

	Sate of Washington	Seattle	Tacoma
Exchange Service	$4,928,482	$3,058,001	$746,517
Toll Service	1,804,994	165,137	48,900
Miscellaneous	199,845	136,270	25,008
Total Tel. Rev.	$6,933,321	$3,359,408	$820,425

Telephone Expenses

	Sate of Washington	Seattle	Tacoma
Current Maintenance	$1,355,555	$716,729	$154,344
Deprec. & Amortization ...	1,145,603	543,335	159,725
Traffic	2,092,265	1,240,379	268,968
Commercial	595,316	311,099	84,898
Gen. and Misc.	155,177	65,770	16,329
Uncollectible Opr. Rev.	27,929	17,319	3,180
Taxes	467,520	216,776	79,472
Rent Deductions	59,348	25,430	2,127
Licensee Con. Exps.	292,066	143,456	35,355
Total Tel. Exps. ...	$6,190,719	$3,280,293	$804.398
Net Tel. Rev.	$724.602	$79,115	$16.027
Per Cent Net Revenue	3.30%	.69%	.58%

1922

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service in the State of Washington (not including Spokane) during the year 1922 amounted to 3.17 per cent, for its Seattle Exchange, .19 per cent, and for its Tacoma Exchange, .89 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operations for 1922 is as follows:

[fol. 108] Average Cost of Property

	State of Washington	Seattle	Tacoma
Aver. Plant and Equip. ...	$26,139,600	$14,566,256	$2,712,966
Aver. Working Assets	1,013,122	709,509	131,646
Total	$27,152,722	$15,275,765	$2,844,612

Telephone Revenues

	State of Washington	Seattle	Tacoma
Exchange Service	$5,131,823	$3,179,771	$768,732
Toll Service	2,011,296	204,787	54,497
Miscellaneous	233,001	164,541	27,045
Total Tel. Rev.	$7,376,120	$3,549,099	$850,274

Telephone Expenses

	State of Washington	Seattle	Tacoma
Current Maintenance	$1,329,653	$716,322	$152,667
Deprec. & Amortization ...	1,297,881	660,148	164,154
Traffic	2,180,554	1,316,954	278,430
Commercial	669,843	356,617	90,867
Gen. and Misc.	186,558	78,101	19,728
Uncollectible Opr. Rev. ...	27,250	18,008	3,813
Taxes	468,075	214,897	77,150
Rent Deductions	47,376	8,895	1,485
Licensee Con. Exps.	307,363	149,684	36,532
Total Tel. Exps. ...	$6,514,553	$3,519,626	$824,826
Net Tel. Rev.	$861,567	$29,473	$25,448
Per Cent Net Rev.	3.17%	.19%	.89%

That the amounts by which the net telephone revenues derived by the company from its telephone business in the State of Washington (not including Spokane), in Seattle and in Tacoma fall short of a return of 8 per cent upon said cost of the property used or useful in and devoted to the rendition of said telephone business are as stated below for the respective periods indicated:

[fol. 109]

	State of Washington	Seattle	Tacoma
Year 1919	$537,242	$312,793	$187,587
Year 1920	686,716	535,352	193,050
Year 1921	1,058,984	833,945	205,110
Year 1922	1,310,651	1,192,588	202,121

C. S. Casassa.

[fol. 107] Average Cost of Property

	State of Washington	Seattle	Tacoma
Average Plant and Equip...	$21,614,809	$10,804,927	$2,634,648
Aver. Working Assets.....	905,017	608,326	129,566
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Year 1921	1,058,984	833,945	205,110
Year 1922	1,310,651	1,192,588	202,121

C. S. Casassa.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owens. Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. E. FLEAGER—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, C. E. Fleager, being first duly sworn, depose and say: That I am the C. E. Fleager who made the affidavit herein as to value verified the 19th day of April, 1923.

That the property used by the plaintiff in the rendition of its service is classified under the system of accounts prescribed by the Interstate Commerce Commission, the so-called depreciable property being shown under the following items, with the account numbers as indicated:

212. Buildings.
221. Central Office Telephone Equipment.
222. Other Equipment of Central Offices.
231. Station Apparatus.
232. Station Installations.
233. Interior Block Wires.
234. Private Branch Exchanges.
235. Booths and Special Fittings.
241. Exchange Pole Lines.
242. Exchange Aerial Cable.
243. Exchange Aerial Wire.
244. Exchange Underground Conduits.
245. Exchange Underground Cable.
246. Exchange Submarine Cable.
[fol. 110] 251. Toll Pole Lines.
252. Toll Aerial Cable.
253. Toll Aerial Wire.
254. Toll Underground Conduit.
255. Toll Underground Cable.
256. Toll Submarine Cable.
261. Office Furniture and Fixtures.
262. General Shop Equipment.
263. General Store Equipment.
264. General Stable and Garage Equipment.
265. General Tools and Implements.

That in the rendition of its service, the plaintiff uses up the property of the classes indicated in the foregoing classification.

For instance, a switchboard, which under the above classification, would come under the head of central office equipment, Account No. 221, will have a certain useful life in the rendition of the company's service, at the expiration of which it will be discarded.

Among the causes which end the useful life of any piece of depreciable property are natural wear and tear, obsolescence, the fact that it becomes inadequate for the service required of it, public requirements, that is, requirements of public authorities that render necessary changes in plant, storms, fires and other casualties.

When property is discarded, usually more or less salvage is realized from it. Under the said accounting rules and practices the term "net salvage" means the net amount realized from the discarded property; that is, the amount realized from it, less the cost of removing and disposing of it.

The amount of this net salvage will obviously vary radically with the different classes of property. For instance, if it were necessary to take down an old pole line, probably the cost of taking the pole line down would amount to more than the poles could be sold for so that here the net salvage would be a minus amount. On the other hand, in the case of the switchboard, the net salvage would be a substantial amount, although the fact that the relatively large item of labor incidental to its original installation would be entirely lost, would tend to minimize such net salvage.

The cost of depreciable property used up in the rendition of the plaintiff's exchange service, less the net salvage recovered on account of this property when it is discarded, is a part of what it has cost the plaintiff to render this service during the term of the useful life of the property in question.

Under the said accounting rules and practices and under the accounting rules of the Department of Public Works of Washington, the plaintiff is required to charge this cost or expense to its operating expenses, except certain minor items charged initially to certain clearing accounts, in equal periodical increments during the useful life of the property, and this is done month by month. At the time that this charge is made to operating expenses a corresponding credit [fol. 111] is made to the account entitled "Reserve for Accrued Depreciation."

When a piece of property is discarded, this account "Reserve for Accrued Depreciation" is charged with the difference between the cost of this property and the net salvage recovered from it. At the same time the proper fixed capital account is reduced by the amount of the original cost of the property in question.

This cost of rendering plaintiff's service is treated in the accounts in the same manner in which other cost items extending over a considerable period are treated. In the cases of taxes covering a year or interest covering a fixed period, or expenses of financing and bond discounts covering a number of years, the total expense is ascertained and is then charged to the operating expenses and credited

to the account entitled "166—Taxes Accrued," or "167—Accrued Liabilities Not Due," as the case may be, against which account the payment when made is charged in a lump. In none of these cases is any specific reserve actually set aside.

While the depreciation account is entitled "Reserve for Accrued Depreciation," no reserve in the sense of a fund set aside for this specific purpose is maintained. The moneys taken out of earnings and represented by these charges to operating expenses and credits to this account go into the general funds of the plaintiff and find their way into property and plant owned by it so that as parts of its investment are retired, they are replaced by other investments in a like amount and its capital is maintained unimpaired.

The factors which determine the amount which should be periodically charged to the operating expenses and credited to the account "Reserve for Accrued Depreciation" are the original cost of the property, the net salvage, the term of its useful life, and the co-efficient of safety which good business management requires in cases where expense items are to be met, the amount of which cannot me exactly known in advance. The original cost is readily and definitely ascertainable. What will be the useful life of any piece of telephone property and what will be the net salvage recovered upon the termination of this life, are factors looking to the future which must necessarily be based upon estimates founded upon the judgment of those educated in the business applied to the recorded experience of the company over a long series of years.

While the exact time when any specific piece of property will go out of use may not be accurately determinable, the average useful lives of the various classes of property are factors which may be fixed with substantial accuracy and this is true also as to the determination of the net salvage. These determinations should be reviewed from time to time and where there are changes in conditions or in the character of the plant which appears to be more than temporary so as to affect substantially these averages, corresponding adjustments should be made.

During the last six years it has been part of my duty to study continuously the facts bearing upon these factors of useful life and net salvage, for use as a basis for revision of charges to operating expenses and credits to accounts "Reserve for Ac-rued Depreciation" when changed conditions made the same proper. The last such revision [fol. 112] made effective the 1st day of August, 1919, produced a reduction in the composite rate previously in effect and applied to present depreciable property in the State of Washington from 6.23 per cent to 5.84 per cent.

That in the contract made between the Postmaster General and the plaintiff in connection with the federal possession, control and operation of the plaintiff's property during the year from August, 1918, to August, 1919, the comparable composite rate for the charges to operating expenses and clearing accounts and credits to the account "Reserve for Accrued Depreciation" was fixed at 5.72 per cent except that the item of Right of Way, Account No. 207, was not

included in this composite rate but was carried separately with a depreciation rate of 2.55 per cent. This item is small and would not materially affect the said figure of 5.72 per cent. This composite figure was applied to plaintiff's total depreciable property during the year of federal operation.

That upon the termination of federal operation on August 1, 1919, plaintiff put into effect the rates of depreciation shown below and these rates have been continued in effect up to this time:

Depreciation Rates in Effect Since August 1, 1919

212. Buildings	3.0
Cable, Aerial:	
242. Exchange	5.4
252. Toll	5.0
Cable, Underground:	
245. Exchange	3.0
255. Toll	2.8
Cable, Submarine:	
246. Exchange	8.0
256. Toll	8.0
221. Central Office Equipment	8.0
222. Other Equipment of C. O.	8.0
Conduit, Underground:	
244. Exchange	2.7
254. Toll	2.0
261. Office Furniture and Fixtures	10.0
Pole Lines:	
241. Exchange	10.0
251. Toll	6.1

[fol. 113]

207. Right of Way:	
Exchange	2.55
Toll	2.55

Station Equipment:

231. Station Apparatus	8.0
232. Station Installations	
233. Interior Block Wires	
234. Private Branch Exchanges	8.0
235. Booths & Spl. Fittings	8.0
262. General Shop Equipment	10.0
263. General Store Equipment	10.0
264. General Stable and Garage Equipment	20.0
265. General Tools & Implements	20.0

Wire, Aerial:

243. Exchange	10.0
253. Toll	3.8

That the composite rate resulting from the application of the above specific rates to the depreciable property in the State of Washington was 5.70 per cent for the year 1920, 5.76 per cent for the year 1921, and 5.71 per cent for the year 1922.

That under the regulations of the Interstate Commerce Commission plaintiff is required to file an annual report as of December 31st, showing, among other things, the composite rate of depreciation charged during the year. Plaintiff has so filed the composite rate so charged for each year.

That the amendment to Paragraph 5 of Section 20 of the Interstate Commerce Act, made by Section 435 of the Transportation Act, 1920, became effective on February 28, 1920, and that in the exercise of the authority vested in the Interstate Commerce Commission by said amendment to the Interstate Commerce Act, on March 18, 1920, it issued the following order:

"Interstate Commerce Commission, Washington

March 18, 1920.

To all carriers concerned:

"Section 435 of the Transportation Act, 1920, contains the following provison:

" 'The Commission shall, as soon as practicable, prescribe for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it [fol. 114] deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not be charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall

in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.'

"Information received by the Commission indicates the existence of doubt as to the propriety of carriers making any charges to operating expenses with respect to depreciation prior to such time as the Commission shall prescribe the specific percentage of depreciation which shall be charged.

"The purpose of this circular is to dispel any such doubt as may exist in the minds of accounting officers.

"Until the Commission shall otherwise order, all carriers subject to the Act to regulate commerce should continue to observe the requirements respecting the accounting for depreciation which are embodied in the effective accounting classifications prescribed by the Commission for the respective classes of carriers.

"George B. McGinty, Secretary."

That in order to carry out the provisions of said Section 20, as amended, the Interstate Commerce Commission organized a subdivision of its bureau of accounts, which is designated as the depreciation section, with Mr. Frank S. Fowler as chief for the purpose of aiding the commission in carrying out the provisions of said section as amended.

That for over a year last past, the said depreciation section has been conducting an investigation of the subject, preliminary to public hearings, which the commission has indicated its purpose to hold with reference to this matter. In connection with this investigation Mr. Charles A. Heiss, Comptroller of the American Telephone and Telegraph Company, has been authorized to represent the Bell System companies, including the plaintiff, before the depreciation section.

That on January 6th, 1921, the said Mr. Fowler addressed to the said Mr. Heiss a letter, copy of which follows:

"Interstate Commerce Commission, Bureau of Accounts Washington

"January 6, 1921.

"Mr. Charles A. Heiss, Comptroller American Telephone & Telegraph Co., 195 Broadway, New York, New York.

DEAR SIR:

"Section 20 of the Interstate Commerce Act, as amended February 28, 1920, requires the Interstate Commerce Commission to prescribe for carriers subject to the Act, the classes of property for which [fol. 115] depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall be charged with respect to each of such classes of property.

"For the purpose of carrying out these requirements a preliminary investigation of the depreciaton question is being conducted to secure

all information possible to formulate recommendations which will be made public and fully considered at public hearings before the Commission takes the final steps required by the act.

"In view of the magnitude of this subject and its paramount importance it is desired that all interested persons be given an opportunity to present their views and you are therefore requested to submit, with as little delay as possible, a statement or brief representing the opinion of your company with respect to the classes of depreciable property (by groups if practicable), the method of ascertaining the service life and salvage value, the basis upon which depreciation charges should be accrued, the necessity for accruals, the relation of maintenance charges to depreciation and the manner in which the percentages of depreciation applicable to the several classes of property should be determined.

"It is also desired that you incorporate in the statement any suggestions or procedures which in your judgment will aid the Commission to reach a just and reasonable determination of the questions involved.

"It will be much appreciated if you will advise me of the approximate date of your statement may be expected.

"Yours very truly, Frank S. Fowler, Chief of Depreciation Section."

That in response to this letter, Mr. Heiss wrote Mr. Fowler, under date of March 24th, 1921, setting forth in behalf of the Bell System the view, opinions and suggestions endorsed by those conpanyies responsible to the third and fourth paragraphs of the above letter.

That the rates put into effect on August 1, 1919, when the federal government surrendered the posession and control of plaintiff's property, as above set forth, have been maintained in effect pursuant to said order up to the present time.

That under date of December 30, 1921, pursuant to the requirement of the Interstate Commerce Commission, plaintiff filed with said Commission the said specific rates of depreciation so put into effect an August 1, 1919.

That under date of March 10, 1923, the Interstate Commerce Commission issued an Order No. 14700, setting the date of May 1, 1923, at 10:00 A. M. at Washington, D. C., for the beginning of the presentation of evidence. That said Order had attached thereto a report of the preliminary investigation of depreciation charges of telephone companies and the conclusions and recommendations of the depreciation section for the regulation of such charges.

That in the meantime the plaintiff has been and is now co-operating with Mr. Heiss in an endeavor to furnish the data necessary to enable the Commission to prescribe, under the Act of Congress afore-
[fol. 116] said, the classes of plaintiff's property for which depreciation charges may properly be included unde roperating expenses and the percentage of depreciation which shall thereafter be charged by the plaintiff with respect to each class of property.

That the "Reserve for Accrued Depreciation" of the plaintiff company as of December 31, 1922, is accrued and accounted in common

with respect to all its property in the States of Washington, Oregon, California and Idaho and is not more than sufficient for the telephone property that is owned and is being operated by the said company throughout its said territory, of which the property in Washington is an integral part.

That if the reserve could be divided among the states on the basis of plant values or cost that the resultant proportionate reserve for Washington is not more than sufficient for that property. If such a separation could be made a corresponding separation would neces-arily have to be made in other accounts and transactions of the Company. The financial results of the business in the State of Washington over the period of accumulation of the reserve have been such as to make impossible the accruing of any such proportion of the Company's Depreciation Reserve had Washington's proportion of the necessary interest and dividend payments been realized from the business in that State.

To compare the reserve for accrued depreciation with the amount of physical depreciation existing in the plant, as the majority opinion undertakes to do, is to compare factors which are not comparable, for the reason that physical depreciation, commonly referred to as per cent condition, is a factor of present physical condition, and as such is but one of the many factors to be considered from the viewpoint of current expense of depreciation, which is the problem of distributing the total amount there concurrently month by month over the life in service of the plant by a proper recognition in current expenses.

As heretofore pointed out, the so-called reserve here under discussion is in fact a debit account and not a source of current funds for this or any other purpose; and the resources indicated thereby are in fact among the general assets of the Company and to deny a current expense by recourse to these assets, which is the necessary result of carrying the order of majority of the Department into effect, is to compel the meeting of a current expense by a recourse to plaintiff's general assets and an arbitrary dissipation of plaintiff's assets in lieu of providing curent rates sufficient to meet the current expense of depreciation.

That, in my judgment, a rate of depreciation of three and one-half per cent is totally inadequate and insufficient to cover the expense of depreciation that is and will be experienced in the property in the State of Washington. That said rate of three and one-half per cent is stated by the majority order to be designed to decrease the amount of the reserve which is erroneous in principle in that it admittedly does not cover for the period in question the pro rata of the amount of depreciation actually to be experienced. That from [fol. 117] numerous studies and calculations I have never found from the actual experience of the company a rate in the aggregate of less than five and one-quarter per cent.

C. E. Fleager.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVITT OF P. H. COOLIDGE—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

P. H. Coolidge, being first duly sworn, deposes and says: That he is a graduate of the Massachuetts Institute of Technology in the class of 1894. That he has been employed by the Pacific Telephone and Telegraph Company since August 1, 1909, and prior to that time, from 1897, was employed by the Western Electric Company, and that he has had more than twenty-five years' experience in the telephone business.

That since August 1, 1911, he has been General Commercial Superintendent of The Pacific Telephone and Telegraph Company, in which position he has charge and supervision of the making of schedules of rates for that company and the preparation of studies in relation thereto, including studies of the effect of rates on the revenue of the company. That he is familiar with all the rates and charges which are made by The Pacific Telephone and Telegraph Company for telephone service and facilities furnished by that company and with the schedules of such rates which are now and have been from time to time filed by that company with the Department of Public Works of Washington and its predecessors, the Public Service Commission of Washington, and with the various changes in rates, so filed, which have from time to time been made. That the exchange rates which The Pacific Telephone and Telegraph Company now has in effect for telephone service in the State of Washington, including Seattle and Tacoma, have been continuously in effect since March 1, 1919, and that the toll rates now in effect have been continuously in effect since January 21, 1919.

That he is familiar with the order of the Department of Public [fol. 118] Works of Washington, dated March 31, 1923, signed by two members of said Department, and also with the order made on the same date, signed by the third member of said Department.

That he has made a careful estimate of the revenue which will be derived by The Pacific Telephone and Telegraph Company in the State of Washington (not including Spokane) for the year 1923,

in the event that the rates, both toll and exchange, now and since 1919 in effect shall continue in effect throughout said year, taking into consideration the probable growth in the number of telephones which will be experienced and the growth in the toll business. That he has made a similar estimate for the year 1923 of the revenue which will be experienced by The Pacific Telephone and Telegraph Company and derived from its Seattle and Tacoma Exchanges, in the event that said rates now and since 1919 in effect shall continue in effect throughout the year 1923. That as a result of this estimate, in his opinion, the revenue of The Pacific Telephone and Telegraph Company for the State of Washington (not including Spokane), which will be derived under the present rates for the year 1923, will be the sum of $8,068,071.20 and the revenue which will be derived for the same period and under existing rates for Seattle will be the sum of $3,806,034.50, and for Tacoma will be the sum of $893,-660.20.

That he has also made an estimate of the effect on the revenues of The Pacific Telephone and Telegraph Company in the State of Washington (not including Spokane) and for Seattle and Tacoma for the year 1923, if the rates, both toll and exchange, fixed in the minority order of March 31, 1923, were in effect throughout said year; and from this estimate has determined that, if the rates, both toll and exchange, fixed in the minority order of March 31, 1923, were in effect for the year 1923, the revenue of The Pacific Telephone and Telegraph Company from its business in the State of Washington (not including Spokane) for that year would be the sum of $9,237,391.24, and for Seattle $4,539,284.45, and for Tacoma, $1,016,801.90. That, in his opinion, the return to the Pacific Company, even under the minority rates, while greater than under the rates now and since 1919 in effect, would be less than sufficient and less than the return to which the Pacific Company is entitled upon its property used and useful in rendering telephone service therein, and that the service to be had by subscribers under those rates would be worth more to them than the charges therefor.

That he has had a long experience in making estimates of the amount of revenue to be derived under different schedules of rates for varying periods in the future, and it has been his experience that estimates so made by him approximate closely the results actually experienced. That, in his opinion, the estimates made by him for the State of Washington (not including Spokane), for Seattle and Tacoma for the year 1923, under the two schedules of rates as hereinabove set forth, are substantially correct and that the results actually experienced or to be experienced thereunder would not vary to any material extent from the said estimates.

P. H. Coolidge.

[fol. 119] Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF HENRY L. GRAY—Filed Apr. 24, 1923

STATE OF WASHINGTON,
County of King, ss:

I, Henry L. Gray, being duly sworn, depose and say:

My age is forty-two years. I was educated at the University of Missouri. I reside at Seattle, Washington, where I maintain an office at 840 Henery Building from which I engage in the practice of civil and electrical engineering specializing in the valuation of public utility properties; in rate and service investigations and reports on public utilities for investment houses. My engineering training and experience extend over a period of approximately twenty-four years. My preliminary training was acquired in connection with telephone and railroad construction. For the past sixteen years, I have continuously engaged in work involving valuations of properties of public service corporations, a general outline of such work being as follows:

In 1906, I was employed by the Railroad Commission of Washington as Assistant Engineer in connection with the valuation of railways then being conducted by that state. In 1908, I became Chief Engineer; and in 1911, and through a change of name of the regulatory body, I became Chief Engineer of the Public Service Commission of Washington, and continued in that capacity until February 1, 1913. My work with the Railroad Commission and Public Service Commission of Washington consisted to a large extent of the valuation of public utility properties of all kinds, including telephone properties, and in public utility rate and service investigations.

On February 1, 1913, I opened my office in Seattle as a consulting engineer, specializing in public utility work; and since that date my work has consisted practically altogether of valuations and rate and service investigations for public utilities, municipalities and regulatory bodies, and in the preparation of reports on existing and proposed public utility projects for investment houses. My work as engineer in private practice has called for a close study of [fol. 120] the subject of the valuation of public utility properties, and has required my appearance in valuation and rate cases before the regulatory bodies of Washington, Oregon, Idaho, California and Illinois, as well as before special commissions in Canada.

In my work, since 1906, I have appraised sixty-three different public utility properties. In the case of nine of these properties, I acted as principal assistant to the engineer in charge; while in the case of the remaining fifty-four properties, which represented an investment

of more than Five Hundred Million Dollars (-500,000,000), I was engineer in charge of all work. Of these fifty-four properties, ten were telephone systems, consisting of the plant of the Independent Telephone Company of Seattle, the plants of the Northwest Telephone Company in Snohomish County, Washington, and the plants owned by The Pacific Telephone and Telegraph Company in Seattle, Spokane, Tacoma, Everett, Bellingham, Centralia, Olympia and Bremerton, all in the State of Washington. In addition, I have been connected in a consulting capacity with a number of other appraisals, generally for the purpose of appraising some particular class of property, or investigating some particular feature of the case. I am familiar with the methods employed by experts, commissions and courts in arriving at the values of public utilities, and with the general trend of labor and material costs.

Since May 1, 1922, I have been continually engaged in an examination of the property and affairs of The Pacific Telephone and Telegraph Company within the State of Washington, and in a determination of the value of the property devoted to public use by such company in that state. As the result of this investigation, I am convinced that the value of such property (excluding Spokane) on the 31st day of December, 1922, was in excess of Thirty-five Million Two Hundred Fifty Thousand Dollars ($35,250,000.00). My reasons for this conclusion are as follows:

The value of the property in question will be represented by its reasonable reproduction cost, less accrued depreciation, plus a fair allowance for what is ordinarily known as going value. Due to the sudden and unprecedented increase in construction costs following the beginning of the World War, and to the possibility that such high prices may continue for a considerable period, it is admittedly difficult to arrive at what might be called a reasonable reproduction cost. Diagrams "A" and "B" attached hereto show that during the period from the end of the panic, in 1896, to about the beginning of the year 1915, there was a steady and almost uniform increase in the costs of labor and materials, as evidenced by the Wholesale Commodity Price Index Numbers, computed and published by the United States Bureau of Labor Statistics. But following the year 1915, there was a heavy increase in labor and material costs, the peak of such costs being reached about the middle of the year 1920. Following this peak, there was a marked decline in prices, which continued until about the beginning of the year 1922; but since the early part of that year, there has been a general increase in wholesale commodity prices and a very substantial increase in the costs [fol. 121] of labor and materials entering into construction. On April 1, 1923, the average cost of construction labor and materials was approximately thirty per cent higher than the corresponding costs of April, 1922, and were only twenty-two per cent less than the peak costs of 1920. The present trend of prices is decidedly upward, and this condition has existed for more than a year. It is impossible to predict to what extent this increase will continue, but at the present time there is no indication of any recession

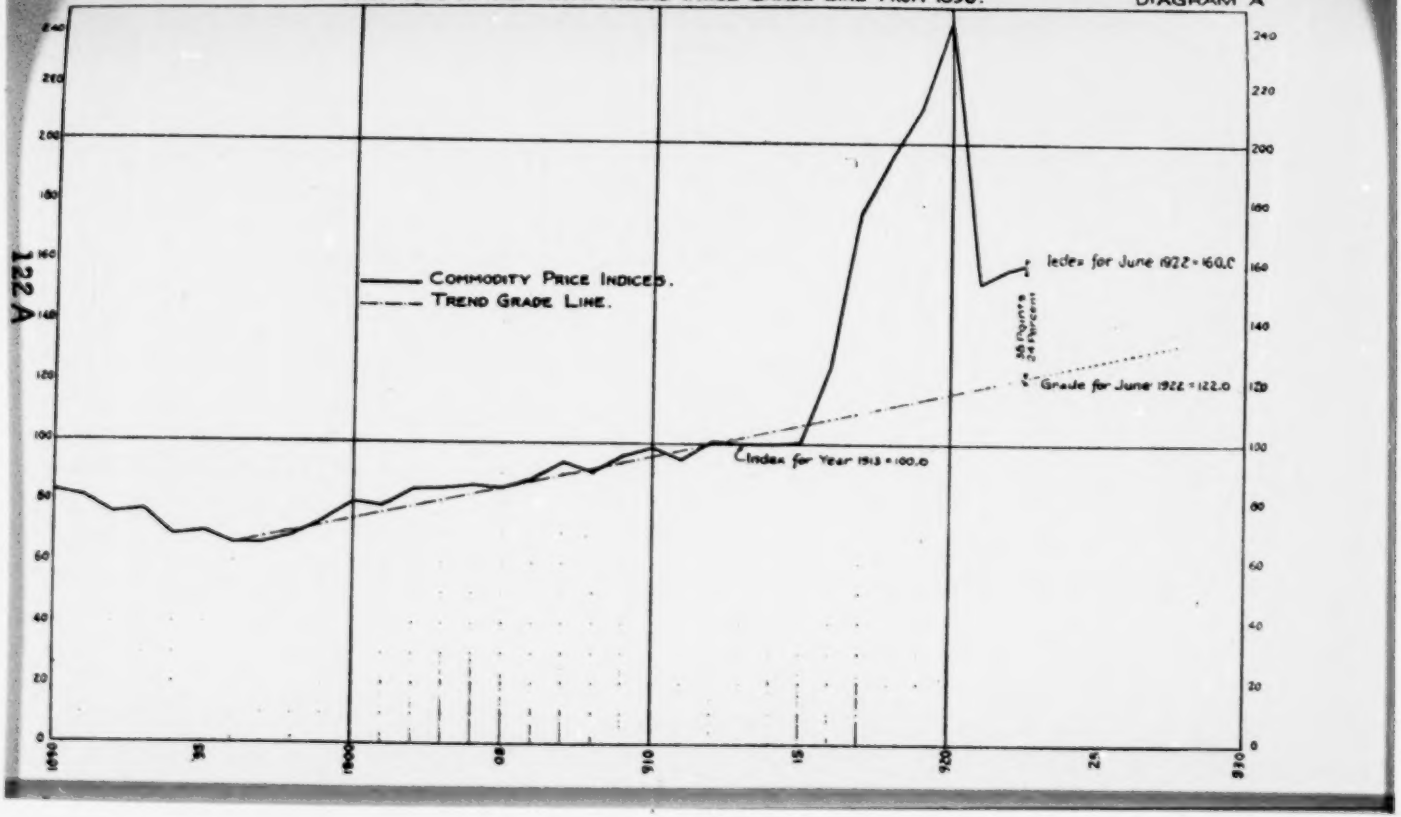
in construction or maintenance costs. On the contrary, all of the data available indicates a still further increase in such costs, as labor costs in general are advancing. It is difficult to abandon the idea that present-day costs eventually will recede, but as to when this will occur, no one can say; and it is generally conceded that a new price level has been established and that construction costs never again will reach pre-war levels. Under the circumstances as recited, the difficulties of arriving at what might be termed "a reasonable reproduction cost" are obvious.

The reproduction cost of the property in question, as of June 30, 1922, less accrued depreciation, and plus a reasonable allowance for going value, was stated by The Pacific Telephone and Telegraph Company to be Forty-two Million Eight Hundred Forty-five Thousand One Hundred Eighty-nine Dollars ($42,845,189). I have made a study of this reproduction cost estimate, of the going value calculation and of the accrued depreciation in question, and am convinced that the above amount, or $42,845,189, stated by The Pacific Telephone and Telegraph Company to represent the reproduction cost of its property within the State of Washington (excluding Spokane) as of June 30, 1922, less accrued depreciation and plus going value, is reasonable, fair and conservative. This, if added to the cost of additions to the property of the said company within the State of Washington between the dates of June 30, 1922, and December 31, 1922, which I find to have been $1,116,896.00, would give a resulting reproduction cost less depreciation plus going value, as of the latter date, of $43,962,085.00. In the absence of any unusual conditions, this might be considered to be the fair value of the property in question.

It is my opinion that in fixing value, the possibility of an ultimate recession in prices must be taken into consideration; and that to base the value of a property solely upon labor and material costs of the present would be unwise; and that in arriving at such value the construction costs of the present would be unwise; and that in arriving at such value the construction costs of the present should be discounted to some extent—and the determination of the proper discount is the problem.

Diagram "B" attached hereto shows the general similarity of the graphs of Wholesale Commodity Price Indices, during the years 1914 to 1923, inclusive, as computed and published by the Bureau of Labor Statistics, and the corresponding Construction Cost Indices computed and published by the Engineering News-Record. Diagram it is apparent that had the World War not occurred, that prices Indices during the period from 1890 to 1923; and from this dia- [fol. 122] gram it is apparent that had the World War not occurred, that prices might have been expected to follow the general upward trend indicated by the Trend Grade Line from the end of the panic in 1896 to the beginning of the year 1915; and that therefore on June 30, 1922, commodity prices in general would have been approximately thirty-eight points or twenty-four per cent less than the corresponding prices actually prevailing upon that date.

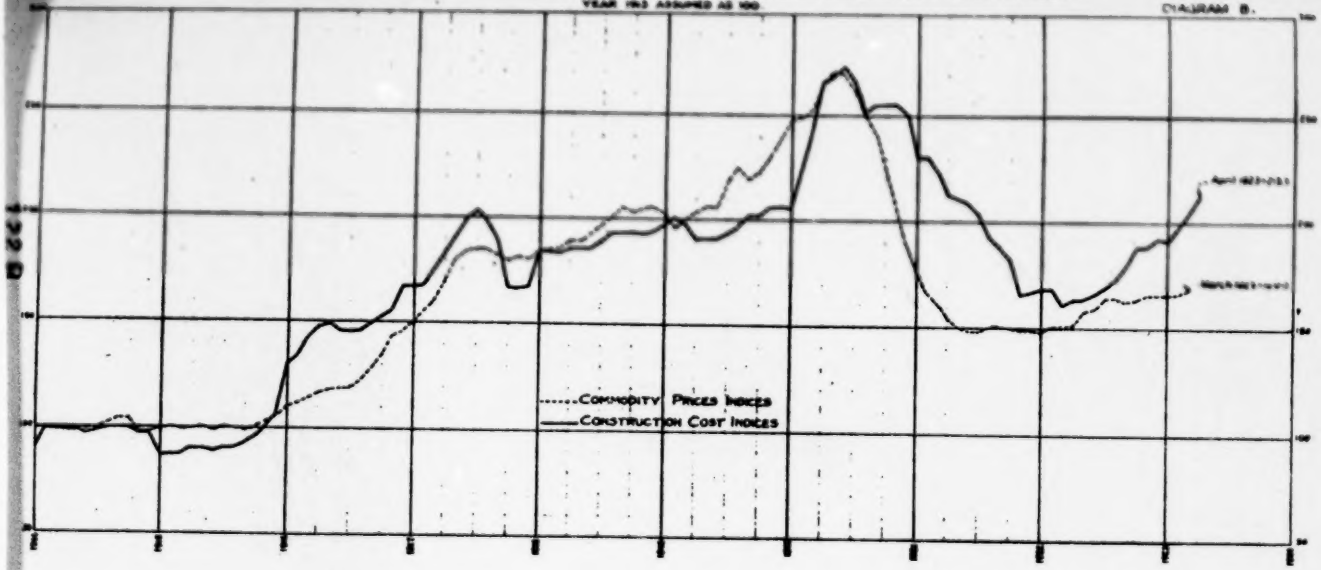
GRAPH SHOWING AVERAGE YEARLY INDICES (OLD NUMBERS) OF WHOLESALE COMMODITY PRICES, FROM 1890 TO 1923 WITH TREND PRICE GRADE LINE FROM 1896. DIAGRAM A



GRAPHIC COMPARISON OF WHOLESALE COMMODITY PRICES AND CONSTRUCTION COSTS 1914 TO 1923.

YEAR 1913 ASSUMED AS 100.

DIAGRAM B.



Applying a reduction factor of twenty-four per cent to the reproduction cost less depreciation of the property in question as of June 30, 1922, and adding a reasonable allowance for going value, would result in a total of $34,137,400.00, which, when there is added thereto the cost of additions to the property of the said company within the State of Washington (excluding Spokane) during the last six months of the year 1922, or $1,116,896.00, will give a total of $35,254,296.00. Therefore I believe that the fair value of the property in question, or that owned within the State of Washington (excluding Spokane) and used for the public convenience by The Pacific Telephone and Telegraph Company on December 31, 1922, is in excess of $35,250,000.00.

Henry L. Gray.

Subscribed and sworn to before me this 23rd day of April, 1923. J. E. Peterson, Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

(Here follow Diagrams A and B, marked side folio pages 122a and 122b)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF RALPH H. MACMICHAEL—Filed Apr. 24, 1923

STATE OF WASHINGTON,
County of King, ss:

Ralph H. Macmichael, being first duly sworn, says that he resides at East Seattle, Washington; that he has been engaged in the banking business for more than twenty years; that he is Vice President of the Dexter Horton National Bank of Seattle, with which institution he has been connected for more than ten years, and that during this time he has been directly in charge of the Bond Department of said bank, which deals in investment securities of the classes offered to what are known in banking circles as the conservative investor, and that a very large part of this business consists in the handling [fol. 123] of public utility securities; that the handling of such securities necessitates constant investigations into the operations, properties, earnings and securities of electric, gas, telephone, street railway and other public utilities.

That it is the opinion of the deponent that a public utility such as the plaintiff should earn an annual return of not less than eight (8) per cent (after providing for depreciation) upon the fair and reasonable value of its property used or useful in the rendition of its service in order to place its securities upon a parity with other investments competing for funds in the market.

That in order to make the securities of a public utility saleable, it is necessary that public confidence in such securities be established and maintained. The investors must have reasonable assurance of the integrity of the investment and the safety of their money, and must be afforded a return at least equal to the returns which they could obtain through other available investments of similar desirability.

That the cost to public utilities of borrowed money, where the loans are adequately secured and where there is a fixed obligation to return the money borrowed at a definite date is obviously less than the fair return necessary to induce the investment of funds that are to be invested at the risk of the business. That the cost of borrowed money to public utilities during the last three years has run as high as ten (10) per cent for short term loans and has averaged well over six (6) per cent for long time money. That at present such corporations cannot obtain money on long time loans, even though adequately secured at less than an average cost of close to six (6) per cent. That prudence and conservatism dictate that only a proportion of the capital requirements of such corporations should — raised by the sale of bonds or other loans. That it is fundamental that public utilities which expect to continue permanently in business and which are required continuously to increase their investments in order to meet the public service requirements imposed upon them, must have a market for their stocks, and their stocks are not salable to investors unless it can be demonstrated that the company offering such stocks is earning and will continue to earn at least a reasonable return upon the value of its property devoted to the public use. That there is active competition among utility corporations, industries and other businesses for the surplus funds which are at any time available for new investments, and plaintiff, like the others, is compelled to meet this competition and to offer inducements to investors equal to those offered by others at the same time.

Ralph H. Macmichael.

Subscribed and sworn to before me this 23rd day of April, 1923. Maurice R. McMicken, Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

[fol. 124] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. J. PHILLIPS—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of King, ss:

I, W. J. Phillips, being first duly sworn, depose and say: That I am Division Commercial Superintendent of the plaintiff, The Pacific Telephone and Telegraph Company, and reside at Seattle, Washington; that I have been continuously employed by the plaintiff company and its predecessors for twenty-five (25) years; that since 1900 I have held my present position, or a similar position, in other sections of the company's territory;

That I have examined the records of the company and find that during the five months ending March 31, 1923, there were in the Seattle Exchange three thousand four hundred ninety-two (3,492) telephone stations disconnected for all reasons, an average of six hundred ninety-eight (698) per month; that in the Tacoma Exchange during the five months ending March 31, 1923, there were nine hundred ninety-eight (998) telephone stations disconnected for all reasons, which is an average of two hundred (200) per month; that the number of subscribers represented by these disconnected stations is available only after a lengthy analysis, but the number of subscribers is only slightly less than the number of stations.

That in the Seattle Exchange, as stated in the affidavit of Mr. J. C. Nowell, there are more than fifty-six thousand (56,000) subscribers; that of these 56,000 subscribers 24,726 are four-party residence subscribers, and 19,124 are individuals and two-party residence subscribers.

That in the Tacoma Exchange, as stated in the affidavit of Mr. J. C. Nowell, there are more than sixteen thousand (16,000) subscribers; that of these 16,000 subscribers 12,255 are two-party and four-party residence subscribers, and 801 are individual residence subscribers.

That during the year 1922 there was collected for long distance toll messages at the Seattle Exchange a sum in excess of forty-two thousand dollars ($42,000) from hotels. This sum is made up of many messages from 10 cents in price upward; that the particular person making the call is frequently unknown to the plaintiff company owing to the semi-public and public nature of these telephones; that there are in addition other telephones of a public and semi-public nature from which substantial sums of money are collected under the same circumstances; that if increased rates are not granted, it will be practically impossible to recover the difference between the present charge and a higher charge should it be deemed proper to recover it at a later date.

That during the year 1922 there was collected for long distance toll messages at the Tacoma Exchange, a sum in excess of eleven Thousand dollars ($11,000) from hotels. This sum is made up of many messages from 10 cents in price upward; that the particular

[fol. 125] person making the call is frequently unknown to the plaintiff company owing to the semi-public and public nature of these telephones; that there are in addition other telephones of a public and semi-public nature from which substantial sums of money are collected under the same circumstances; that if increased rates are not granted, it will be practically impossible to recover the difference between the present charge and a higher charge, would it be deemed proper to recover it at a later date.

W. J. Phillips.

Subscribed and sworn to before me this 30th day of April, 1923. Maurice R. McMicken, Notary Public in and for the State of Washington, Residing at Seattle. (Seal of Notary.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

MOTION TO DISMISS—Filed Apr. 30, 1923

Come now the defendants E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, and each of them, and move the court to dismiss the bill of complaint filed herein for the reasons and upon the grounds that as appears upon the face thereof

I. Said bill of complaint does not state any matters of equity entitling the complainant to the relief prayed for.

II. Said bill of complaint does not state facts sufficient to entitle complainant to any relief against these defendants.

Wherefore defendants and each of them pray the judgment of this court whether they shall further answer, and that they be dismissed with their costs.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 126] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

Come now the defendants E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, and each of them, and move the court for an order denying the application for an interlocutory injunction and declaring said restraining order to be void from its inception, and in the alternative, to dissolve said restraining order.

This motion is based on the files and records in the above entitled case, and upon the affidavit of E. V. Kuykendall, hereto attached.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF E. V. KUYKENDALL—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of Thurston, ss:

E. V. Kuykendall, being first duly sworn, on oath deposes and says:

That he is one of the defendants named in the above entitled proceeding; that he is now and has been for more than three years last past the duly appointed, qualified and acting Director of the Department of Public Works of said state, and as such charged with the duty of administering the provisions of the "Public Service Commission Law" of said state and the acts amendatory thereof and supplementary thereto. That, during the incumbency of affiant as Director for said Department of Public Works, he has conducted, as provided by law, a large number of investigations involving the properties, rates and service of public utilities operating within the said state, and, in particular, of telephone companies, including plaintiff. That prior to his incumbency, the Public Service Commission of Washington, predecessor of the Department of Public Works of [fol. 127] Washington, had conducted, as by law provided, a large number of investigations of the properties, rates and service of utili-

ties generally and telephone companies operating within the said State. That these investigations have resulted in the accumulation of a large amount of date involving every feature of the construction, operation and maintenance of telephone properties within said state, and this data has at all times been available and has been used by the affiant and the staff working with him in the employ of the state of Washington for examination and comparison in investigations of the sort herein involved, and in particular with respect to the investigation which is the subject of this action. That the record made before defendants in the proceeding which is the subject of this action consists of 1,438 typewritten pages of testimony and some sixty exhibits, many of the latter being voluminous and containing technical calculations, all of which were given careful consideration.

That affiant has examined and is familiar with the bill of complaint and exhibits, and the affidavits in support of the bill of complaint, filed herein. That there is now and was at the time of the hearing before the Department of Public Works herein substantial agreement between the experts, engineers and accountants in the employ of the state of Washington and acting under the direction of affiant and the experts, engineers and accountants testifying for the plaintiff herein, with the following exceptions:

(a) Treatment of expense of depreciation;
(b) Treatment of compensation paid to the American Telephone and Telegraph Company.

That the amount of the expense items above designated as (a) and (b) have a controlling effect upon the rate of return shown in any statement prepared to reflect the result of plaintiff's operations.

There are two general methods of determining the amount which should be charged to operating expenses on account of depreciation. One of these methods may be referred to as the "life table method." It is the method which has been used by plaintiff, and has resulted in the accrual of a balance in its "reserve for accrued depreciation" which amounts to approximately twenty-seven per cent of the original cost of its depreciable property. Stated briefly, the application of the life table methods is substantially as follows:

A given group of plant units is found to have an average life in service of ten years, with no salvage value. It therefore follows, under the computation made on this basis, that the average annual rate of depreciation will be ten per cent. The amount obtained by application of this percentage is set aside annually in the depreciation reserve in order that when the property reaches the end of its useful life there may be in the reserve an amount equal to its original cost. This method inevitably results in building up a credit balance in reserve for the reason that, in a constantly growing plant, the annual retirements will not equal the annual credits to the reserve account.

The affidavit of one C. E. Fleager, on file herein, states in part as follows:

[fol. 128] "The factors which determine the amount which should be periodically charged to the operating expenses and credited to the

account 'reserve for accrued depreciation' are the original cost of the property, the net salvage, the term of its useful life, and the coefficient of safety which good business management requires in cases where expense items are to be met, the amount of which cannot be exactly known in advance."

The Uniform System of Accounts, prescribed by the Interstate Commerce Commisison for telephone companies and adopted by defendants for the keeping of accounts of companies such as plaintiff, provides as follows (p. 67):

"Depreciation of Plant and Equipment.—Telephone companies should include in operating expenses depreciation charges for the purpose of creating proper and adequate reserves to cover the expenses of depreciation currently accruing in the tangible fixed capital. By expense of depreciation is meant

"(a) The losses suffered through the current lessening in value of tangible property from wear and tear (not covered by current repairs).

"(b) Obsolescence or inadequacy resulting from age, physical change, or supersession by reason of new inventions and discoveries, changes in popular demand, or public requirements, and

"(c) Losses suffered through destruction of property by extraordinary casualties."

The classification of accounts duly and regularly promulgated by the defendants in complaint with law, and in which form plaintiff is required to keep its accounts, does not provide as an element of the expense of depreciation "a coefficient of safety which good business management requires in cases where expense items are to be met, the amount of which can not be exactly known in advance," nor is such an item of depreciation expense properly allowable.

The second method of determining expense of depreciation may be designated the "retirement method." In the application of this method a period of years of the past operations of the property is analyzed to determine the original cost of those items of the plant which have had to be replaced. The sum of these retirements for the period analyzed is divided by the number of years in the period, which gives an average annual retirement in dollars, that is to say, the actual average annual necessities of the utility in providing for retirement of its property over the period analyzed is thus ascertained. This actual experienced expense, when related to the average plant value for the period, gives a depreciation percentage which, in a growing plant, is uniformly less than the annual percentage obtained by applying the life table method. Under the retirement method, the reserve, if it exists at all, is very small in its relation to the plant value.

Affiant states that the record made before defendants indicates that the rate for depreciation which plaintiff has heretofore used was too large and its application has resulted in the accrual of a reserve which is larger than the plaintiff's necessities require and is in excess of the amount the rate payer should be required to provide [fol. 129] to cover expense of depreciation. Affiant further says

that from the record made before defendants it appears that the property being currently installed by plaintiff is in large part property of longer life, and hence less rapidly depreciable, than the property heretofore installed; that, in view of this fact and the size of the depreciation reserve, as computed by plaintiff, and the necessary result of the calculation of the expense of depreciation resulting from the application of the method employed by plaintiff, a reduction in the rate of allowance for depreciation expense employed by plaintiff should be made for a period of two years in the future, and that such new rate of depreciation as set forth in the order herein is both reasonable and proper and subject to such future readjustment as the facts may warrant. The effect of this reduction over a period of two years will be to diminish the percentage relation of the depreciation reserve to the cost of the depreciable plant. After proper relation of the depreciation reserve to the cost of the depreciable plant has been once established, the charge to operating expenses on account of depreciation can be more accurately determined.

Affiant says that in the bill of complaint filed herein there are certain allegations, and, in the supporting affidavits also filed herein, there are certain statements regarding the "cost of property," "book cost of property," "cost of reproduction" and "present fair value" of the properties of plaintiff. That neither in the bill of complaint nor in the supporting affidavits are the details and component figures of these various costs and values set forth, nor are the relation or comparison of these figures, costs and values to the rate base employed by affiant herein set forth. That in the entry of the order herein a rate base was determined by taking the original valuation of the properties of plaintiff as found prior to the instant proceeding before the defendants and adding thereto the net additions and betterments up to the time of the inquiry. That the original valuation of these properties was unreviewed under the provisions of the Public Service Commission Law and has long since become conclusive. That the determination of the rate base by adding to the original valuation the net additions and betterments up to the date of the inquiry is the method of rate base determination provided by law in this case.

That affiant has read and is familiar with the contents of an affidavit of one C. S. Cassassa, filed herein. That said affidavit contains income statements for the years 1919, 1920, 1921 and 1922, showing the per cent net revenue claimed to have been earned by plaintiff from it operations during said years. That affiant has caused these income statements to be changed in two respects and presents the results herewith. That said changes consist in (a) changing the amount of depreciation and amortization allowance to an allowance of three and one-half per centum in accordance with the findings of fact made by the affiant herein and (b) changing the amount of the allowance to the American Telephone and Telegraph Company under the so-called four and one-half per centum contract to an allowance of ninety cents per station in accordance with the findings of fact of the affiant herein.

[fol. 130] State of Washington

1919

Average Cost of Property

Total	$17,718,176	(unchanged)

Telephone Revenues

Total	$5,689,247	(unchanged)

(a) Telephone Expenses

Total	$4,809,035	(unchanged)
Reduction in Allowance for depreciation and amortization	331,444	
Total Telephone Expense (Revised)	$4,477,591	
Net Telephone Revenues	$1,211,656	
Per cent. Net Revenues	6.84%	

(b) Telephone Expenses

Total	$4,809,035	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	129,911	
Total Telephone Expenses (Revised)	$4,679,124	
Net Telephone Revenues	$1,010,123	
Per cent. Net Revenues	5.70%	

(c) Telephone Expenses

Total	$4,809,035	(unchanged)
Reduction in Allowance for Deprec. and Amort. and Licensee Con. Exps.	461,355	
Total Telephone Expenses (Revised)	$4,347,680	
Net Telephone Revenues	$1,341,567	
Per cent. Net Revenues	7.57%	

[fol. 131] State of Washington

1920

Average Cost of Property

Total	$19,168,206 (unchanged)

Telephone Revenues

Total	6,655,979 (unchanged)

(a) Telephone Expenses

Total	5,809,239 (unchanged)
Reduction in Allowance for Depreciation and Amortization	336,765
Total Telephone Expenses, (Revised)	$5,472,474
Net Telephone Revenues	$1,183,505
Per cent Net Revenues	6.17%

(b) Telephone Expenses

Total	$5,809,239 (unchanged)
Reduction in allowance for Licensee Con. Exps.	168,059
Total Telephone Expenses (Revised)	$5,641,180
Net Telephone Revenues	$1,014,799
Per cent Net Revenues	5.29%

(c) Telephone Expenses

Total	$5,809,239 (unchanged)
Reduction in Allowance for Deprec. and Amort. and Licensee Con. Exps.	504,824
Total Telephone Expenses (Revised	$5,304,415
Net Telephone Revenues	$1,351,564
Per cent Net Revenues	7.05%

[fol. 132] State of Washington

1921

Average Cost of Property

Total	$22,519,826 (unchanged)

Telephones Revenues

Total	6,933,321 (unchanged)

(a) Telephone Expenses

Total	$6,190,719 (unchanged)
Reduction in Allowance for Depreciation and Amortization	357,409
Total Telephone Expenses (Revised)	$5,833,310
Net Telephone Revenues	$1,100,011
Per cent Net Revenues	4.88%

(b) Telephone Expenses

Total	$6,190,719 (unchanged)
Reduction in Allowance for Licensee Con. Exps.	173,647
Total Telephone Expenses (Revised)	$6,017,072
Net Telephone Revenues	$916,249
Per cent Net Revenues	4.07%

(c) Telephone Expenses

Total	$6,190,719 (unchanged)
Reduction in Allowance for Deprec. & Amort. and Licensee Con. Exps.	531,056
Total Telephone Expenses (Revised)	$5,659,663
Net Telephone Revenues	$1,273,658
Per cent Net Revenues	5.66%

State of Washington

1922

Average Cost of Property

Total	$27,152,722 (unchanged)

[fol. 133] Telephone Revenues

Total	$7,376,120 (unchanged)

(a) Telephone Expenses

Total	$6,514,553 (unchanged)
Reduction in Allowance for Depreciation & Amortization	347,536
Total Telephone Expenses (Revised)	$6,167,017
Net telephone revenues	$1,209,103
Per cent Net Revenues	4.45%

(b) Telephone Expenses

Total	$6,514,553 (unchanged)
Reduction in Allowance for Licensee Con. Exps.	184,445
Total Telephone Expenses (Revised)	$6,330,108
Net Telephone Revenues	$1,046,012
Per Cent Net Revenues	3.85%

(c) Telephone Expenses

Total	$6,514,553 (unchanged)
Reduction in Allowance for Deprec. & Amort. and Licensee Con. Exps.	531,981
Total Telephone Expenses (Revised)	$5,982,572
Net Telephone Revenues	1,393,548
Per cent Net Revenues	5.13%

The controversial matters are the two items of expense, (1) depreciation, (2) compensation to the American Telephone and Telegraph Company under the licensee contract. Defendants have reduced the annual depreciation charge for a period of two years to three and one-half per centum and have fixed the compensation under the said contract at ninety cents per station instead of four and one-half per centum of the gross operating revenue. Such action is not capricious or confiscatory but is fully warranted by the facts.

Further than this deponent saith not, save that this affidavit is made in support of a motion to dissolve the temporary restraining order heretofore issued herein.

E. V. Kuykendall.

[fol. 134] Subscribed and sworn to before me this twenty-eighth day of April, 1923. J. H. Brown, Notary Public in and for the State of Washington, Residing at Olympia.

[File endorsement omitted.]

In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Motion to Stay

Come now the defendants still relying upon their motion to dissolve the temporary restraining order, and denying the application for an interlocutory injunction, and move the court for a stay in the above entitled action pending the final determination of a suit which has been instituted in the superior court of the state of Washington for Thurston county, having jurisdiction thereof under the laws of the state, to enforce the order enjoined in the above entitled case, which suit is accompanied by a stay in such state court of the proceedings under such order pending the determination of such suit by such state court.

This motion is based on the files and records in the above entitled case, and upon the affidavit of E. V. Kuykendall, hereto attached.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants. T. J. L. Kennedy, P. C. Sullivan, Alex Winston, James M. Geraghty, Of Counsel.

In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Affidavit of E. V. Kuykendall—Filed Apr. 30, 1923

State of Washington,
County of Thurston, ss:

E. V. Kuykendall, being first duly sworn, on oath deposes and says: That he is the duly appointed, qualified and acting Director of Public Works of the State of Washington, and one of the defendants in the above entitled action; that an action has been instituted in the superior court of the state of Washington for Thurston county and served upon him, the pleadings in such action being in words and figures as follows: to-wit:

[fol. 135] EXHIBIT TO KUYKENDALL'S AFFIDAVIT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 8972

THE STATE OF WASHINGTON ex Rel. THE CITY OF SEATTLE, a Municipal Corporation, Petitioner and Relator,

v.

E. V. KUYKENDALL, as Director of Public Works; HANCE H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the Persons Constituting That Portion of the Department of Public Works of Washington Exercising Jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," and The Pacific Telephone and Telegraph Company, a Corporation, Respondents

MOTION FOR WRIT OF REVIEW

Comes now the above named petitioner and relator and moves the court for an order for a writ of review directed to E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the division of Public Utilities under the "Public Service Commission Law," requiring and ordering them to certify to this court for review the records and proceedings in that certain proceedings before them, entitled: "The Department of Public Works of Washington, Complainant, v. The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company, respondents—The City of Seattle, a municipal corporation, et al., complainants, v. The Pacific Telephone and Telegraph Company, a corporation, defendant, No. 5344, (Consolidated cases)."

This motion is based upon the petition and application for writ of review, filed herein, and the other records and files in the above entitled cause.

Thomas J. L. Kennedy, Corporation Counsel; Walter B. Beals, Assistant; George A. Meagher, Assistant, Attorneys for Petitioner and Relator.

[fol. 136] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

[Title omitted]

ORDERS FOR WRIT OF REVIEW

The court having read and examined the petition and application for writ of review heretofore filed in the above entitled cause by and on behalf of The City of Seattle, a municipal corporation, praying that a writ of review be issued forthwith directing E. V. Kuykendall, as Director of Public Works, Hence H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," to certify to this court for review the records and proceedings in that certain proceeding before them, entitled; "The Department of Public Works of Washington, complainant, v. The Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company, respondents,—The City of Seattle, a municipal corporation, et al., complainants, v. The Pacific Telephone and Telegraph Company, a corporation, defendant, No. 5344, (Consolidated cases);" and it appearing to the court that said writ should issue; Now, Therefore, on motion of Thomas J. L. Kennedy, Corporation Counsel of the City of Seattle, and Walter B. Beals and George A. Meagher, Assistant Corporation Counsel of the City of Seattle, attorneys for the petitioner and relator, it is hereby

Ordered that a writ of review issue forthwith, directed to said E. V. Kuykendall, Hance H. Cleland and Frank R. Spinning, in their respective official capacities, requiring and directing that the record in said cause be certified to this court on or before the 23rd day of May, 1923, at the hour of 10:30 o'clock A. M.; It is further

Ordered that said writ be served by filing the same forthwith in the principal office of the Department of Public Works of Washington, at Olympia.

Done in open court this 27th day of April, 1923.

D. F. Wright, Judge.

[fol. 137] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

[Title omitted]

WRIT OF REVIEW

The State of Washington to E. V. Kuyendall, as Director of Public Works; Hance H. Cleland, as supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," and The Pacific Telephone and Telegraph Company, a corporation, respondents:

Whereas, The City of Seattle, a municipal corporation, has this day filed in the above entitled court its petition and application for a writ of review, supported by affidavit, from which it appears that the above named E. V. Kuykendall, Director of Public Works, and Frank H. Spinning, Supervisor of Transportation, being a majority of the persons constituting that portion of the Department of Public Works of Washington charged with the enforcement of the "Public Service Commission Law," and, in the exercise of jurisdiction thereunder in the Division of Public Utilities, did, on the 31st day of March, 1923, make alleged findings of fact, render an opinion, and enter an order in the proceedings before the said Department of Public Works, in the Division of Public Utilities, entitled: "The Department of Public Works of Washington, complainant, v. The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company, respondents—The City of Seattle, a municipal corporation, et al., complainants, v. The Pacific Telephone and Telegraph Company, a corporation, respondent, No. 5344 (consolidated cases)," which said alleged findings of fact, opinion and order were served on The City of Seattle within thirty (30) days last past, to-wit, on the 2nd day of April, 1923.

And it further appearing that said order denied the prayer contained in the complaint and supplemental complaint of The City of Seattle for reduction in telephone rates, and that said order was based on certain incompetent testimony and disregarded competend testimony; and,

Whereas, it further appears that the complainant in said proceeding, The City of Seattle, deems the aforesaid order to be contrary to law and seeks the issuance of a writ of review for the purpose of having the reasonableness and lawfulness thereof inquired into and determined; and,

Whereas, it further appears that The City of Seattle has no right of appeal nor any other plain, speedy, adequate or other remedy at law or otherwise, and no remedy except a writ of review, and the

court being fully advised in the premises; Now, Therefore, it is hereby

[fol. 138] Ordered that the said E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," certify their entire record in said cause entitled, "The Department of Public Works of Washington, complainant, v. The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company, respondents—The City of Seattle, a municipal corporation, et al., complainants, v. The Pacific Telephone and Telegraph Company, a corporation, respondent," numbered 5344 in their files, and file the same in this court, together with all evidence and all exhibits introduced before them in the hearings by them had in respect to said cause, together with all orders, docket entries and other entries in said cause by them made, and all things touching the said cause, as fully and entirely as it remains before you and the said Department of Public Works of Washington, Division of Public Utilities; And it is further

Ordered that this writ be, and it is hereby, made returnable on the 23rd day of May, 1923, (being a date less than thirty days from the date of issuance hereof), at the hour of 10:30 o'clock A. M., on or prior to which said date the aforesaid record shall be certified and filed herein; And it is further

Ordered that the said respondents, E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," and the Pacific Telephone and Telegraph Company, a corporation, appear before this court on said return date, at the said hour of 10:30 A. M., at which time a hearing will be had upon the reasonableness and lawfulness of the said order which was entered on the 31st day of March, 1923, as aforesaid, said hearing to be conducted as provided by law, and at said time this court may further cause to be done whatever it may appear of right ought to be done, and in the meantime that they, and each of them, and said Company desist from filing, or attempting to file, new or other or alternative telephone tariffs or schedules of telephone rates in the premises; And it is further

Ordered that this writ be served by filing the same in the principal office of the Department of Public Works of Washington at Olympia.

Herein fail not and have you then and there this writ.

Witness the Honorable D. F. Wright, Judge of the Superior Court of the State of Washington, for Thurston County, at Olympia, this 27th day of April, 1923.

D. F. Wright. Attest: Paul Paulk, County Clerk and ex-Officio Clerk of the Superior Court.

[fol. 139] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

[Title omitted]

APPLICATION AND PETITION FOR WRIT OF REVIEW

Comes now The City of Seattle, a municipal corporation, by its attorneys, Thomas J. L. Kennedy, Corporation Counsel, and Walter B. Beals and George A. Meagher, Assistant Corporation Counsel, deeming that certain order (hereinafter more fully described and referred to) of E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the "Public Service Commission Law," (hereinafter referred to as Department of Public Works), to be contrary to law, and hereby applies to the court for a writ of review, directed to the above named respondents, for the purpose of having the reasonableness and lawfulness of said order inquired into and determined. In support of this application, The City of Seattle shows the court:

I. That the petitioner and relator, The City of Seattle, is now, and at all times herein mentioned has been, a municipal corporation and city of the first class, organized and existing under and by virtue of the laws of the State of Washington.

II. That the respondent, The Pacific Telephone and Telegraph Company, is now, and at all times herein mentioned has been, a corporation and a "public service company" and "telephone company," owning, operating and managing certain telephone lines used in the conduct of the business of affording telephonic communication for hire within the State of Washington and within the city limits of the City of Seattle, pursuant to law and franchise grants from said City.

III. That Albert S. Burleson, at that time Postmaster General of the United States, was, on the 22nd day of July, 1918, designated by the President of the United States to supervise and direct the operation of certain telephone and telegraph lines temporarily taken in charge by the President of the United States pursuant to that certain joint resolution of the Congress of the United States, approved July

16, 1918, authorizing the President of the United States to supervise, take possession and assume control of telegraph, telephone and other systems of communication for the duration of the war with the Imperial Government of Germany.

IV. That heretofore, on the 5th day of August, 1916, the Public Service Commission of Washington, in Cause No. 1825 of its files, found, after hearing upon complaint, that certain telephone rates, [fol. 140] tolls and charges under the rules and regulations therein promulgated to govern the same, including certain provisions for discounts, were sufficiently remunerative to the above named respondent telephone company, the said findings as to rates, charges, rules and regulations and discounts being thereafter, on the 1st day of September, 1916, embodied in a tariff filed with the Public Service Commission of the State of Washington, a copy of said tariff, in so far as the same relates to The City of Seattle, being hereto attached, marked Exhibit "A," and by such reference made a part hereof.

V. That, on or about the 5th day of November, 1918, during the war period of "Federal wire control," certain officials of the above named respondent telephone company, pretending to act on behalf of the Federal Government, which was at that time in control of the entire plant and system of said telephone company and of all of its employees, issued, and thereafter filed with the Public Service Commission of Washington, a pretended new tariff and schedule of rates, attempting to supersede the tariff and rates hereinabove mentioned, and which was intended to become effective as of November 15, 1918, without the thirty day notice to, or the permission of, the said Public Service Commission, and seeking and pretending to change and increase the tariff, rates and charges theretofore authorized by the Public Service Commission and changing the aforesaid rules and regulations and eliminating said discounts; that a copy of said pretended tariff is hereunto attached, Marked Exhibit "B" and by such reference made a part hereof; that said pretended tariff, in so far as the same attempted to change said rules and regulations and to eliminate said discounts, and in so far as it attempted to provide for increased rates and charges, was unjust, unfair and unreasonable, and contrary to, and not authorized by, law.

VI. That, the entire plant and system of the respondent telephone company being at that time subject to, and under, Federal war time control, the Public Service Commission of Washington was without any jurisdiction in the premises and was without authority or jurisdiction to receive or file said tariff or to make any order in respect to the same, and said pretended tariff and schedule of rates was therefore without legal effect or standing in law; that the said Public Service Commission nevertheless attempted to assume jurisdiction and to hold a hearing in respect to the same in Cause No. 4747 of its files, and attempted, after said hearing, to approve, and made an order approving, said tariff; that said order approving said tariff was set aside by the Supreme Court of the State of Washington as not within the jurisdiction of the Public Service Commission during Federal

wire control; that said decision of the Supreme Court is reported in Volume 110 of the Washington Reports, at page 130; that the said order of the Public Service Commission and the said tariff were, and are, ineffective for any purpose; that the Federal wire control was terminated on or about August 1, 1919, and the said plant and system of the said respondent returned to it by the Federal Government; that the said respondent thereafter filed no new tariff (and [fol. 141] has not to this day filed any new tariff in the premises with the exception of a disapproved tariff hereinafter referred to), but continued to charge, and still continues to charge, its patrons in Seattle the rates prescribed in said pretended tariff herein set forth as Exhibit "B," although the only lawful tariff on file on behalf of said respondent in respect to the City of Seattle is the tariff herein set forth as Exhibit "A."

VII. That the rates, tolls, contracts, charges and rules and regulations imposed upon telephone users, within the City of Seattle under said pretended tariff (Exhibit "B") are unjust, unfair, unreasonable and more than sufficient and not authorized by any tariff on file with the State Department of Public Works or with its predecessor, the Public Service Commission of Washington; that, in so far as said rates, tolls and charges are in excess of the rates prescribed in the tariff herein set forth as Exhibit "A," the same are unlawful overcharges and excessive and exorbitant in amount and subject to be repaid to the telephone users, together with interest thereon from the date of collection thereof.

VIII. That Ordinance No. 43170 is a valid and subsisting ordinance of the City of Seattle, entitled:

"An ordinance relating to, and providing for, the filing with the Department of Public Works of Washington of a complaint against the Pacific Telephone & Telegraph Company, and for the obtaining of evidence to sustain said complaint, and declaring an emergency,"

passed by the City Council on the 6th day of February, 1922, and approved by the Acting Mayor on the 7th day of February, 1922, and that, pursuant to authority thereby granted, a complaint was signed by the Acting Mayor, verified on oath, and filed by The City of Seattle with the Department of Public Works and given cause number 5344 in its files.

IX. That, on or about the 20th day of September, 1922, the above *above* named respondent telephone company issued and filed with the above named Department of Public Works a new tariff and schedule of rates, entitled: "W. D. P. W. No. 3, The Pacific Telephone & Telegraph Company Exchange Rate Schedule," purporting to have been issued as of October 2, 1922, and to be effective November 1, 1922; that said tariff, having been specifically disapproved by said Department of Public Works, is no longer in issue and need not be herein further referred to.

X. That Ordinance No. 44257 is a valid and subsisting ordinance of The City of Seattle, entitled:

"An ordinance relating to, and providing for, the filing with the Department of Public Works of Washington of a complaint against the Pacific Telephone and Telegraph Company, and for the obtaining of evidence to sustain said complaint, and declaring an emergency,"

[fol. 142] passed by the City Council on the 16th day of October, 1922, and approved by the Mayor on the 17th day of October, 1922, and that, pursuant thereto, a supplemental complaint was signed by the Mayor, verified on oath, and filed with the Department of Public Works in said Cause No. 5344 of its files.

XI. That, prior to the filing of said complaint and supplemental complaint by The City of Seattle, the Department of Public Works, on its own motion, had filed, in its Cause No. 5344, its own complaint, entitled: "The Department of Public Works of Washington, complainant, v. The Pacific Telephone Company, respondents," complaining of the existing tariffs, rates, tolls, facilities and service of said telephone companies throughout the State of Washington, including The City of Seattle; that the complaint and supplemental complaint of The City of Seattle, hereinabove referred to, were consolidated in the same cause with the said complaint of the Department of Public Works, and that on the 18th day of December, 1922, and dates subsequent thereto, the said Department of Public Works proceeded to hear and take evidence and testimony in respect to said complaints and supplemental complaint, combining the hearing thereof with sundry other complaints, the consolidated hearing being, and in, said Cause No. 5344 of the files of said Department of Public Works, entitled, "The Department of Public Works of Washington, complainant v. The Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company, respondents, — The City of Seattle, a municipal corporation, et al., complainants, v. The Pacific Telephone and Telegraph Company, a corporation, etc., etc., defendants;" that, over the objection of petitioner and relator, the said Department of Public Works received incompetent evidence and considered the same in support of its finding, later made, in respect to the rates and tariffs provided for in said Exhibit "B."

XII. That thereafter, on the 31st day of March, 1923, the said Department of Public Works made and entered its pretended findings of fact, opinion, and final order in said consolidated cases, wherein and whereby said Department of Public Works pretended to order the dismissal of petitioner's complaint and supplemental complaint, in so far as the same sought a reduction in the rates specified in said Exhibit "B," and whereby said Department of Public Works further pretended to find the rates specified in said Exhibit "B" to be just, fair reasonable and not more than sufficient, and to order that said respondent telephone company be authorized to charge the rates

specified in said Exhibit "B"; that said findings, opinion and order were served upon petitioner and relator on the 2nd day of April, 1923.

XIII. That said order of said Department of Public Works, in the respects hereinabove specified, is contrary to law, unreasonable and unlawful, and made without jurisdiction, without the support of any competent evidence, and on the basis of incompetent evidence; that the authority conferred upon said Department of Public Works, in relation to the subject matter, was not pursued in the [fol. 143] mode required by law in order to authorize it to make the determination herein sought to be reviewed; that, in making the determination herein sought to be reviewed, all rules of law affecting the rights of the parties were violated, to the prejudice of the petitioner and relator; that there was no competent proof of any of the facts necessary to be proved in order to authorize the said Department of Public Works to make the determination herein sought to be reviewed; that upon all the evidence there was such a preponderance of proof against the existence of the alleged facts found as the basis for the denying of a reduction in rates, such as would, in an action in court, triable by a jury, authorize the setting of the same aside by the court as against the weight of the evidence; that there was included in the "rate base" upon which the respondent telephone company was held to be entitled to a fair return, millions of dollars of "construction work in progress" not yet used or useful for the public, and thousands of dollars listed as "Due from Subscribers and Agents;" that there was not deducted from said "rate base," but should have been so deducted, hundreds of thousands of dollars of excess funds collected and carried by said telephone company in a depreciation reserve over and above the amounts necessary to cover accrued depreciation; that there was included in said "rate base" millions of dollars of "machine switching" facilities installed in the City of Seattle which added nothing to the service of present subscribers and which was, and is, an injudicious and improvident investment upon which the company is not entitled to a return, fair or otherwise; that, in making its determination, the Department of Public Works considered and gave weight to a "material supply contract" with the socalled Western Electric Company (which is an "associate" or "affiliated" company of the said telephone company, having common or interlocking directorates), which said contract is unlawful at common law and by reason of Federal statutes, and that in making its final determination of the amounts to which the said telephone company was entitled as operating expenses, the said Department of Public Works assumed that the extravagant expenses of said telephone company represented fair expenditures for said purposes.

XIV. That the order so made by said Department of Public Works was, and is, unlawful and unreasonable and contrary to law and without foundation and against the weight of the evidence adduced at the hearing in support of a reduction of rates; that the City

of Seattle has no right of appeal nor any plain, speedy and adequate or other remedy at law and has no remedy except a writ of review; that the petitioner and relator, desiring to have the reasonableness and lawfulness of said order inquired into and determined, makes this application for a writ of review under the provisions of the Public Service Commission Law of Washington.

Wherefore, petitioner and relator, The City of Seattle, prays:

That, inasmuch as the several objections urged in this petition were made before the Department of Public Works in said Cause [fol. 144] No. 5344 in the course of the hearing thereof, and inasmuch as the matters and things herein set forth will appear more fully in the records and files of said Cause No. 5344 in the office of said Department of Public Works, therefore this court issue its writ of review, requiring and commanding said Department of Public Works to certify to this court the records in said proceeding, including the complaint and supplemental complaint of The City of Seattle, and record of all of the testimony taken at the aforesaid hearings, and the finding and order of said Department of Public Works, made and filed on the 31st day of March, 1923, together with all exhibits of every kind and nature offered and received in connection with said hearings, and each and every order made and entered in connection therewith, and that, upon said record being returned into this court, the court grant a full review and hearing of said findings and orders and of all of said proceedings, and that the manifest errors herein complained of be corrected, and that said findings and orders, which are contrary to law and unreasonable, as aforesaid, be in all things set aside and annulled, in so far as the same deny a reduction in telephone rates within The City of Seattle, and that petitioner and relator be granted such further relief as in justice and law it may be entitled to.

The City of Seattle, a Municipal Corporation, By Edwin J. Brown, Its Mayor. Thomas J. L. Kennedy, Corporation Counsel, Walter B. Beals, Assistant; George A. Meagher, Assistant, Attorneys for Petitioner and Relator.

Jurat showing the foregoing was duly sworn to by Edwin J. Brown omitted in printing.

EXHIBIT A TO APPLICATION

W. P. S. C. No. 2, Section 1

The Pacific Telephone & Telegraph Company Exchange Rate Schedule

Exchange: Seattle, Kings Co., Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$7.50	$7.50
Auxiliary Line	6.00	6.00
" " (Inward Service)	3.00	3.00
Suburban Service (Ten Party line, see Sec. 2)	3.00	3.00
Extension (with or without bell)	1.00	1.00

[fol. 145] Residence—Unlimited Service

Individual Line	3.00	3.50
Two-party Line	2.50	3.00
*Four-party Line	2.25	2.75
Extension (without bell)	.50	.50
" (With bell)	.50	.50
Suburban Service (Ten party line, see Sec. 2)	2.50	2.50

Primary Rate Area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

*Discount of 25¢ if bill is paid at office on or before the tenth day of month.

Issued September 1, 1916. Effective September 1, 1916.

Cancels and supersedes Exchange Rate Schedule effective January 1, 1911.

*In accordance with Order No. 1825 of the Public Service Commission of Washington.

P. H. Coolidge, General Commercial Superintendent.

Exhibit "A" (Continued)

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King Co., Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.00	$5.00	100	$.03
" "	6.00	6.00	150	.025
Auxiliary Line	2.50	2.50		
Auxiliary Line	2.50	2.50	...	....
Extension (with or without bell)	.75	.75	...	....

Residence—Measured Service

Business—Coin Box Service

Individual Line	.15	.15	3	.035
Extension with or without bell)	1.00	1.00	...	....

[fol. 146] Residence—Coin Box Service

Issued September 1, 1916. Effective September 1, 1916.

Cancels and supersedes Exchange Rate Schedule effective January 1, 1911.

*In accordance with Order 1825 of the Public Service Commission of Washington.

P. H. Coolidge, General Commercial Superintendent.

Exhibit "B" to Application

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King Co., Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Extension (with or without bell)	1.00	1.00
Suburban Service (Ten party line, see Section 3)	3.50	3.75

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	3.75	4.00
Two Party Line	3.00	3.25
Four Party Line	2.50	2.75
Extension (without bell)	.50	.75
Extension (with bell)	.65	1.00
Suburban Service (Ten party line, see Section 3)	3.00	3.25

Primary Rate Area—See Map.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued November 5th, 1918. Effective Nov. 1, 1918.

Cancels and supersedes Exchange Rate Schedule effective September 1st, 1916.

P. H. Coolidge, General Commercial Superintendent.

[fol. 147] EXHIBIT "B" (Continued)

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King Co., Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line,	$6.50	$6.75	$1.30	$.04
Auxiliary Line	2.50	2.75	....	...
Extension (with or without bell)	.75	.75	....	...

Business—Coin Box Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$.15	$ *	$.03	$.05
*25 cents per month additional.				
Extension (with or without bell) per month	1.00	1.00	....	....

Issued November 5th, 1918. Effective November 15, 1918.

Cancels and supersedes Exchange Rate Schedule Effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

STATE OF WASHINGTON,
County of Thurston, ss:

I, Paul Paulk, Depty. County Clerk of Thurston County and Ex-officio Clerk of the Superior Court of the State of Washington, for Thurston County, holding session at Olympia, do hereby certify that the foregoing is a true and correct copy of the original Motion for Writ of Review, Order for Writ of Review, Writ of Review and Application for Writ of Review, Cause #8972, State ex rel. City of Seattle vs. E. V. Kuykendall, et al. as the same appears on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 27th day of April, 1923.
Paul Paulk, Deputy County Clerk and Clerk of the Superior Court of Thurston County, State of Washington.

and made a part of this affidavit.

E. V. Kuykendall.

[fol. 148] Subscribed and sworn to before me this 25th day of April, 1923. J. H. Brown, Notary Public in and for the State of Washington, Residing at Olympia.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF E. D. RIDLEY CONCERNING RATE BASE AND FAIR RETURN OF PLAINTIFF—Filed Apr. 30, 1923

THE STATE OF WASHINGTON,
County of King, ss:

E. D. Ridley, being first duly sworn, upon oath deposes and says: That affiant is an engineering accountant, of ten years' experience in such work; that affiant served in such capacity and in that of law assistant with the Public Service Commission of Washington for a period of six years; that for some time past, affiant has been associated with Thomas E. Phipps, consulting valuation engineer; that affiant was employed by said Thomas E. Phipps and by the City of Spokane in connection with a plant survey and valuation of the properties of the Pacific Telephone and Telegraph Company and The Home Telephone and Telegraph Company in connection with Cause No. 5344 of the Department of Public Works of Washington, in which the order in this cause complained of was entered by said Department; that, in arriving at the rate base of $32,108,-

853.76 for the purpose of fixing a rate of fair return for the plaintiff telephone companies, the Department of Public Works included $6,712,822 of construction work in progress and $335,964 representing amounts due from subscribers and agents, although both of said amounts might reasonably as a matter of law have been deducted from the rate base as fixed by said Department; that, in making this affidavit, affiant is not basing his opinion on the further contention that might be made that the machine switching program in the City of Seattle, representing practically the total amount of construction work in progress above mentioned, could reasonably have been deducted from the rate base by the Department on the theory that, under the Company's evidence, the same was an injudicious investment; that, allocating to the State of Washington its proportion of the accrued depreciation reserve of The Pacific Telephone and Telegraph Company, a figure of $5,613,816 is arrived at; that, deducting the 15% accrued depreciation found by the Department of Public Works in the amount of $3,073,265, the excess amount for the State of Washington in the depreciation reserve of said Pacific Company amounts to $2,540,551; that in fixing the rate [fol. 149] base above mentioned, the Department of Public Works did not deduct this, or any other, amount as representing excessive accrued depreciation reserve; that if the above or any of the foregoing deductions had been made by the State Department of Public Works, the fair return to the company, as indicated in the opinion and order of the Department, would necessarily have been much higher and in excess of the 6.01% by said Department found to be a fair return which would accrue to the Company under its present rates.

E. D. Ridley.

Subscribed and sworn to before me this 28th day of April, 1923. E. B. McClinton, Notary Public in and for the State of Washington, Residing at Seattle.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

ORDER DISSOLVING RESTRAINING ORDER AND DENYING INJUNCTION—Filed Apr. 30, 1923

This matter coming on for hearing before Hon. William B. Gilbert, Circuit Judge, and Hon. Edward E. Cushman and Hon. Jeremiah Neterer, District Judges, upon plaintiffs' application for an interlocutory injunction and the defendants' motion to dissolve the restraining order heretofore issued,

It is ordered that the restraining order be dissolved and that an interlocutory injunction be denied.

Opinion will be later filed.

Ordered, this 30th day of April, A. D. 1923.

William B. Gilbert, Circuit Judge. Edward E. Cushman, District Judge. Jeremiah Neterer, District Judge.

[File endorsement omitted.]

[fol. 150] IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

OPINION ON APPLICATION FOR AN INTERLOCUTORY INJUNCTION—Filed May 23, 1923

Before Hon. William B. Gilbert, United States Circuit Judge, Hon. Edward E. Cushman and Hon. Jeremiah Neterer, United States District Judges

These causes are before the court upon applications for temporary injunctions under Section 266 of the Judicial Code (Section 1243 Compiled Statutes) and also upon defendants' motions to dissolve the restraining orders heretofore made.

The Complaint in cause No. 166-E alleges that plaintiff operates a telephone and telegraph system in the State of Washington and elsewhere; that the defendants are officers of the State of Washington, as recited in the title hereto; that the order of the Department of Public Works of the State, prescribing maximum rates to be charged by plaintiff for its telephone service, is confiscatory and would deprive plaintiff of its property without due process of law; that, in September, 1922, plaintiff filed a schedule of rates, increasing its charges which was suspended by the Department and an order made that plaintiff withdraw such schedule of rates filed and file a schedule conforming to its schedule in effect prior to the war period, which plaintiff did, save as to charges applicable to the Cities of Seattle and Tacoma; that numerous hearings were had by the Department for the purpose of determining the value of plaintiff's property and the reasonableness of its rates; that a ruling of the Department was made, one member dissenting, denying plaintiff's application for an increase in all respects. The dissenting member found the rates fixed, both toll and exchange, unreasonably low and found the rates filed by plaintiff in compliance with defendants' order to be reasonable.

It is averred that the cost of plaintiff's property in the state—exclusive of that furnishing telephone service to Spokane and adjacent territory (which latter is the subject of suit No. 167-E), was, on

December 31, 1922, $29,347,254.00; that the cost of its Seattle property was $17,023,372.00; and the cost of its Tacoma property, $2,888,021.00; that the cost of such property has been increased since such date by additions and betterments; that the cost to plaintiff of its property was taken by the Department, substantially, as the rate base in fixing its charges in the order attacked; that the cost of reproduction as of the above date was, for the state, not including Spokane, $48,087,785.00; for Seattle $27,149,130.00 and for Tacoma $4,998,964.00; that the cost, less depreciation of such date, for the state was $24,919,930.00; and for Tacoma $4,534,264.00; that the fair and reasonable value of such property as of such date was: for [fol. 151] the State, $35,616,896.00; for Seattle, $20,852,067.00; and for Tacoma $3,457,290.00.

The complaint further alleges that:

"The foregoing statements as to the cost to plaintiff of said respective properties include nothing on account of the item of franchises, or the item known as going concern value, but said latter item has been considered in determining the present cost of reproduction and the present fair and reasonable value of said property."

Not less than eight per cent upon the reasonable value is alleged to be a fair annual rate upon its business.

It is alleged that plaintiff's net return upon such property under the rates ordered for the years 1919, 1920, 1921, and 1922, based upon property cost, has ranged, for the state, from a maximum, in 1919, of 4.97% to a minimum in 1922, of 3.17%; for Seattle, from a maximum, in 1919, of 3.97%, to a minimum, in 1922, of .19%; and for Tacoma, from a maximum in 1919 of .98% to a minimum in 1921 of .58%. That its rate of return during such years, based upon the fair value of its property ranged, for the state, from a maximum in 1919, of 3.67% to a minimum in 1921 and 1922, of 2.58%; for Seattle, from a maximum in 1919, of 2.66% to a minimum, in 1922, of .15%; and for Tacoma from a maximum of .81% in 1919, to a minimum, in 1921 of .48%. That the net revenue received for such years fell short of eight per cent upon the cost of its property in varying amounts, ranging for the state from a maximum in 1922, of $1,310,651.00 to a minimum in 1919 of $537,242.00; for Seattle, from a maximum in 1922 of $1,192,580 to a minimum, in 1919, of $312,793.00; and for Tacoma, from a maximum in 1921, of $205,110.00 to a minimum in 1919 of $187,587.00.

It is further alleged that, if the rates ordered are enforced and efficient service is maintained, it will result in the confiscation of plaintiff's property and prevent it from earning any return upon the fair and reasonable value of its property in the State in excess of 2.11% per annum; that .54% per annum loss would result upon the value of its Seattle property and .56% upon its Tacoma property.

It is alleged that, were the rates of the dissenting order in effect for 1923, plaintiff's return upon the fair and reasonable value of its property in the state would be 5.09%; for the City of Seattle, 2.81% and for Tacoma, 3.96%; that based upon the cost of its property,

for the same period, plaintiff's rate would be, for the state, 6.15%; for the City of Seattle, 3.42%; and for the City of Tacoma, 4.73%; that such last mentioned rates are unreasonably low; but that plaintiff proposes to put them in effect pending final decree and asks relief by way of an interlocutory injunction enabling it so to do.

In the above entitled cause, No. 167-E, involving the Spokane rates, alone, the complaint asks the same relief and, in so far as its allegations differ from the foregoing avers:

That the cost of the property in the Spokane exchange (land being included at present value), was, on the 31st day of December, 1922, $4,266,899.00; that the cost at present is in excess of this amount; that the cost above given is the rate base used by the De-
[fol. 152] partment in the order attacked; that the cost of reproduction as of December 31, 1922, would be $8,039,784.00; that the cost of reproduction, less depreciation, as of that date, would be $7,382,-484.00; that the fair and reasonable value of the Spokane exchange property is $5.710,684.00. The plaintiff's net earnings for the years 1919, 1920, 1921 and 1922, calculated upon the cost of the property, give plaintiff an annual return ranging, from a maximum, in 1922, of 3.07%, to a minimum, in 1920, of 1.79%; that its net earnings for the same years, calculated on the fair value of its property, give returns ranging from a maximum, in 1922, of 2.28%, to a minimum in 1920 of 1.30%. That for such years the net revenue failed to make a return of eight per cent upon the cost, in amounts ranging from a minimum, in 1919, of $193,042.00, to a maximum in 1920, of $237,883.00. That, if the Department's order is enforced, plaintiff would be prevented from earning, in 1923, any return in excess of 1.88% per annum upon the fair and reasonable value of its property. That, if the order of the dissenting member of the Department—which plaintiff asks to have put in effect pending final decree—is enforced, plaintiff would earn, for such time, 5.52% upon the fair value of its property, which would amount to but 7.64% upon its cost.

It is shown herein that the proceedings before the Department, resulting in the rate order attacked by the complaint, were instituted upon the complaint of the Department, after which the City of Seattle filed its supplemental complaint therein attacking plaintiff's then existing rates.

The Department held:

"that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the state of Washington * * *

"The Department's engineering and accounting staff was forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department."

The causes were consolidated for hearing by the Department. On December 14, 1922, the Washington Hotel Men's Association filed its complaint. Representatives of the cities of Tacoma and Spokane took part in the hearing. These hearings resulted in the Department's order attacked herein by plaintiffs.

At the conclusion of a number of hearings, the Department found:

"Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the state of Washington, including the Spokane Exchange, used and useful in public service, was, [fol. 153] as of June 30, 1922, $32,108,853.76 which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company vs. Kuykendall, 119 Wash. 107.

* * * * * * *

"As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

"In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph 'system'. Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific System just as are Seattle and Tacoma, therefore, the valuation made of the Spokane Exchange is treated as an integral part of the state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma. * * *

"Finding

We find that the annual depreciation charge should be reduced from approximately 6% to 3½% for the period of two years from April 1st, 1923, * * *

"Finding

We find that the Four and One-half per cent contract between the Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company is wrong in principle, contrary to public policy and the compensation thereunder should be computed on the per station basis rather than a percentage of revenue. We find a reasonable charge per annum for the services rendered under said contract to be 90 cents per station. * * *

"In the case of the City of Houston vs. Southwestern Bell Telephone Company etc., U. S. Supreme Court Advance Opinions 1921-1922, No. 16, July 1, 1922, p. 539, is cited by respondents as supporting the contract, but the opinion clearly states that the fact that one company owns stock in another 'requires close scrutiny of [fol. 154] their dealings to prevent imposition upon the community served by the company'."

In cause No. 166-E, the Attorney General has moved for a stay of this suit, pending the final determination of a suit brought in the Superior Court of Thurston County, ex rel. City of Seattle, on the ground that the latter suit is one to enforce the order sought to be enjoined herein.

Section 266 of the Judicial Code (Section 1243 Comp. Stats.), in part, provides:

"* * * It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith."

An examination of the record in the suit in Thurston County on the relation of the City of Seattle shows that this suit is one also attacking the rate ordered by the Department, and asks an even lower rate than that provided by the order for Seattle. It is shown that an order has been made by the Superior Court in such suit, in part, as follows:

"Ordered that the said respondents, E. V. Kuykendall as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the 'Public Service Commission Law,' and The Pacific Telephone and Telegraph Company, a corporation, appear before this court on said return date, at the

said hour of 10:30 A. M., at which time a hearing will be had upon the reasonableness and lawfulness of the said order which was entered on the 31st day of March, 1923, as aforesaid, said hearing to be conducted as provided by law, and at said time this court may further cause to be done whatever it may appear of right ought to be done, and in the meantime that they, and each of them, and said Company desist from filing or attempting to file, new or other or alternative telephone tariffs and schedules of telephone rates in the premises."

The rates to be established for the state must be, to a certain extent at least, inter-dependent. Yet it would seem that the suit in the Superior Court, being brought on relation of the City of Seattle, [fol. 155] would not, in the absence of intervention, necessarily be res judicata either of the rates throughout the state, or those of Tacoma or Spokane. Yet it is clear that the Department's course in holding that the questions involved would only be satisfactorily determined after "an investigation and study of the entire system of the Pacific Telephone & Telegraph Company in the State of Washington" was entirely proper. This system and the rate to be fixed, based upon its ascertained value, are in the nature of a res. Therefore, while questions determined in the absence of interested parties, if any, may not strictly be res judicata, yet under the necessities of the case, all the rights and duties of all interested would necessarily be considered and found, if not determined.

The foregoing considerations, coupled with the fact that the suit brought in the Superior Court is not one to enforce the rate order attacked by plaintiffs, but, is itself, one making an attack thereon, renders the proviso of Section 266 of the Judicial Code not strictly applicable. It does not follow, however, that consideration of the institution of such suit is to be ignored, or that it is without effect. This matter will be later considered.

By section 10424 and 10431. Remington's Compiled Statutes, 1922, it is provided:

"Sec. 10424. Whenever any public service company shall file with the commission any schedule, classification, rule or regulation, the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed increase and the reasonableness and justice thereof, and pending such hearing and the decision thereon, the Commission may suspend the operation of such rate, fare, charge, rental or toll for a period of ninety (90) days from the time the same would otherwise go into effect, and after a full hearing the commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective: Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding sixty (60) days.

"At any hearing involving any change in any schedule, classification, rule or regulation the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the burden of proof to show that the changed schedule, classification, rule, or regulation, or the increased or proposed increased rate, fare, charge, rental or toll, is just and reasonable shall be upon the public service company.

"The commission shall give to the hearing and decision of such questions preference over all other questions pending before it and shall decide the same as speedily as possible.

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such [fol. 156] action by the superior court, or, if appealed to the supreme court, by such supreme court." (Laws of 1915, p. 362, sec. 1. Cf. Laws of 1911, p. 594, sec. 82.)

"Sec. 10431. Any public service company affected by any order of the commission, and deeming itself aggrieved, may, after the expiration of two years from the date of such order taking effect, petition the commission for a rehearing upon the matters involved in such order, setting forth in such petition the grounds and reasons for such rehearing, which grounds and reasons may comprise and consist of changed conditions since the issuance of such order, or by showing a result injuriously affecting the petitioner which was not considered or anticipated at the former hearing, or that the effect of such order has been such as was not contemplated by the commission or the petitioner, or for any good and sufficient cause which for any reason was not considered and determined in such former hearing. Upon the filing of such petition, such proceedings shall be had thereon as are provided for hearings upon complaint, and such orders may be reviewed as are other orders of the commission: Provided, that no order superseding the order of the commission denying such rehearing shall be granted by the court pending the review. In case any order of the commission shall not be reviewed, but shall be complied with by the public service company, such petition for rehearing may be filed within six months from and after the date of the taking effect of such order, and the proceedings thereon shall be as in this section provided. The commission may in its discretion, permit the filing of a petition for rehearing at any time. No order of the commission upon a rehearing shall affect any right of action or penalty accruing under the original order unless so ordered by the commission." (Laws of 1911, p. 599, sec. 89.)

It has been contended upon the part of the defendants that the present suit has been prematurely begun because no petition for a re-hearing has been presented by plaintiffs to the Department of Public Works—which is the successor of the Public Service Commission. (Remington's Compiled Statutes section 10784)—asking for a re-consideration of its rate order.

In view of the discretionary character of proceedings upon rehearing and the provision made in the sections quoted denying the right of supersedeas—which latter, while expressly only made applicable to the court's review of the Department's order, it may be assumed, would, in its discretion, be adopted by the Department—it is concluded that the suits have not been prematurely begun upon this ground.

William A. Prendergast, et al. vs. New York Telephone Company (Decided by U. S. Sup. Ct. Apr. 16, 1923).

It was stated upon the argument of the application for a preliminary injunction that, after service of the restraining order, plaintiffs had filed the schedule of rates directed in the order, being those asked pending final determination of the suit. Defendants contend [fol. 157] that this constituted an abandonment by plaintiffs of the rate schedules involved in the Department's hearings and findings. The court concludes that such filing was but a step taken by plaintiffs in rendering effective the restraining order and that its result was not to render the issues involved in these suits merely moot questions.

It has been further suggested that these suits have been prematurely begun because plaintiffs did not, prior to their institution, seek a review of the Department's order by the State court. Sections 10428 and 10429 Remington's Compiled Statutes provide:

"Sec. 10428. Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action." (Laws of 1911, p. 596, sec. 86.)

It will be noted from the foregoing section that, upon review, the court may only render judgment either affirming or setting aside

the order of the Commission, unless the court should hold that the language of this section:

"The court may, in its discretion, remand any cause which is reversed by it to the commission for further action."

gives the court a wider discretion. Unless it is so held, the court is given no power by that section to make its own findings, or fix rates. For this reason, as far as this statute is concerned, the suit has not been begun prematurely. (Bacon v. Rutland R. R. Co., 232 U. S. 134, at 137.)

The plaintiff, The Pacific Telephone and Telegraph Company (Cause No. 166-E), in describing the hearings had by the Department resulting in its order attacked herein alleges:

[fol. 158] "That subsequent to the dates hereinbefore mentioned and between December 18, 1922, and March 1, 1923, said Department held numerous hearings in the State of Washington for the purpose of determining the value of plaintiff's property used or useful in rendering telephone service in the State of Washington; the reasonableness or unreasonableness of the rates and charges then being charged by plaintiff in said state; the reasonableness or unreasonableness of the schedule of rates and charges applicable to the toll service filed as aforesaid by plaintiff on October 5, 1922; and the reasonable*l*ness or unreasonableness of the schedule of exchange rates applicable to Seattle and Tacoma filed as aforesaid on September 20, 1922. * * * That the cost to plaintiff of its property in the State of Washington, in the City of Seattle and in the City of Tacoma is now somewhat in excess of the amounts hereinbefore mentioned on account of the additions and betterments in the meantime made to said respective properties. That the cost to plaintiff of its property in the State of Washington and in the cities of Seattle and Tacoma is substantially the rate base fixed by the Department of Public Works in its said order of March 31, 1923, as of the 30th day of June, 1922, with additions and betterments thereto made since that time."

Similar allegations are contained in the complaint in cause No. 167-E.

The outline above of the complaints in the two suits shows that there is involved a controversy as to the value of the properties; that is, the determination of the rate base.

Section 10441 Remington's Compiled Statutes (which is described in one of its titles as appearing in the 1913 session laws of the state: "Valuation of Public Service Properties as Fixed for Rate Purposes, not to be Used for Taxing Purposes") provides:

"The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of

construction, and the cost or reproducing in its present condition the property of every public service company. * * *

"The commission is hereby authorized to cause a hearing or hearings to be held at such time or times and place or places as the commission may designate for the purpose of ascertaining the matters and things provided for in this section.

"The commission shall, before any hearing is had, notify the company concerned of the time and place of such hearing, by giving at least thirty days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such company's property within the state, which shall be a sufficient complaint to authorize the commission to inquire into the matters designated in this section.

"All companies affected shall be entitled to be heard and intro- [fol. 159] duce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission.

"The commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it shall tend to show the value of the property used by such company for the public convenience.

"Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted or unjust, may institute proceedings in the superior court of the state of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined. Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

"Said public service company or the commission shall have the right to appeal from the decision of the superior court to the supreme court of the state of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper find-

ings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received.

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality or other body politic and the public service company affected is interested, whether arising under the provisions of this act or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such [fol. 160] findings as of the date therein stated under conditions then existing, except as a basis for taxation, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined.

"The commission shall hereafter, from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions, and extensions made by any public service company to its property subsequent to the date of any prior hearing, and shall examine into all traffic movement and every matter and thing that would change, modify, or affect any finding of fact previously made, and shall at such time make findings of fact supplemental to those theretofore made, showing the amount expended in betterments, improvements, extensions and additions since such prior findings and the cost of reproducing the same, the value of the property used by such company at the time of such subsequent hearing, the relative value of the use to which such property is put in the performance of intrastate and interstate business, respectively, and the value of the property of such company in the state used for the public convenience of intrastate business. Such hearing shall be had upon the same notice, the examination conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing and findings: Provided, that such findings made at such supplemental hearing shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing." (Laws of 1911, p. 601, sec. 92; Laws of 1913, p. 662, sec. 1.)

Section 10429 Remington's Compiled Statutes provides:

"The pendency of any writ of review shall not of itself stay or suspend the operation of the order of the commission, but the superior court in its discretion may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

"No order so restraining or suspending an order of the commission relating to rates, fares, charges, toll or rentals, or rules or regulations, practices, classifications or contracts affecting the same, shall be made by the superior court otherwise than upon three days' notice and after hearing, and if a supersedeas is granted the order granting the same shall contain a specific finding, based upon evidence submitted to the court making the order, and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage; Provided, however, that when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed in any case from such order pending the final determination of the cause [fol. 161] in the superior court, or if appealed to the supreme court by such supreme court.

"In case the order of the commission under review is superseded by the court, it shall require a bond, with good and sufficient surety, conditioned that such company petitioning for such review shall answer for all damages caused by the delay in the enforcement of the order of the commission, and all compensation for whatever sums for transportation, transmission or service any person or corporation shall be compelled to pay pending the review proceedings in excess of the sum such person or corporation would have been compelled to pay if the order of the commission had not been suspended.

"The court may, in addition to or in lieu of the bond herein provided for, require such other or further security for the payment of such excess charges or damages as it may deem proper." (Laws of 1911, p. 597, sec. 87.)

The findings of the Department show that its hearings and findings were made in pursuance of section 10441 above.

It clearly appears from the foregoing that, upon a review of the Department's proceedings, neither the Superior nor the Supreme Court is limited to a judgment of affirmance or reversal; but that the Superior Court may

"in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received."

and that

"in case the supereme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper find-

ings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received."

It thus clearly appears that both courts have legislative authority in determining the rate base, superior to that of the Department.

Considerations of "comity and convenience" require the court to hold that, until plaintiffs have exhausted their right to relief in the [fol. 162] Superior and Supreme Courts—relief, in part at least, legislative in character, these causes must be stayed.

Prentis v. Atlantic Coast Line, 211 U. S. 210.

The Public Utilities Commission of the District of Columbia vs. Potomac Electric Power Company et al., (Decided by U. S. Sup. Ct. Apr. 9, 1923).

William A. Prendergast et al. vs. New York Telephone Company, (Decided by U. S. Sup. Ct. Apr. 16, 1923).

Bacon v. Rutland R. R. Co., 232 U. S. 134.

Granted the power, it is not practicable for the Department, the State or Cities to indemnify the plaintiffs in these cases, should plaintiffs in the end prevail and establish the right to higher rates. The reason that it is impracticable is on account of the inconvenience and disproportionate cost to the Department, State and Cities in securing indemnity from each of the telephone users against the contingency of the higher rates being determined in the end the proper rates. It is obvious, on account of changes in those making use of the service furnished by the plaintiffs and the small amounts involved in the individual transactions that it is unreasonable to ask them to look to such users for such indemnity should they ultimately prevail. It is, therefore, clear that—should the showing made establish with reasonable certainty the confiscatory nature of the rates ordered—plaintiffs, upon giving an adequate bond for the protection of those concerned, in case plaintiffs fail to establish their contention, are entitled to have the objectionable rates stayed pending final determination.

The extent of the stay in the Thurston County case is not made clear. It will be assumed that it does not stay the enforcement of the rate attacked by plaintiffs. While the Thurston County case is not one brought to "enforce" the Department's "order," it is one seeking a lower rate than that of such order, and, therefore, puts the Department to the defense of the order which plaintiffs here attack in cause No. 166-E.

The Pacific Telephone & Telegraph Company is made a defendant in the Thurston County case. While the City of Seattle, plaintiff therein, has not secured a stay of the order attacked by plaintiffs herein, and it does not appear that the Pacific Telephone and Telegraph Company has asked for such a stay and been refused, the Superior Court and the Supreme Court of the State of Washington

being vested, by section 10441, with legislative authority superior to that of the Department, this suit must be stayed until such time as plaintiffs have sought such relief from those courts under the state law. If denied a stay of the objectionable order by the State court upon such review, and if denied such stay in the Thurston County case now pending, and such denials are affirmed by the State Supreme Court, the applications herein for a preliminary injunction may be renewed.

Prentis v. Atlantic Coast Line, 211 U. S. 210.
Bacon v. Rutland R. R. Co., 232 U. S. 134 at 137.
Oklahoma Natural Gas Co. v. Campbell Russell, et al., (Decided by Sup. Ct. of U. S. Mar. 5, 1923).

[fol. 163] The same considerations which require that the preliminary injunction be denied, necessitate the dissolution of the restraining order. Reaching this conclusion, the question of the rates, whether fair, reasonable or confiscatory in character, has not been considered.

Judge William B. Gilbert, concurs.
Judge Jeremiah Neterer, concurring, states:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

CONCURRING OPINION—Filed May 23, 1923

NETERER, D. J.: I agree with the conclusion of Judge Cushman that on consideration of comity and convenience this court should not interfere where the plaintiff has open a higher court of the state, The Prentiss Case, 211 U. S. 210; Puget Sound Elec. Ry. Co. v. Lee, 207 Fed. 801, until the State remedy is exhausted. The plaintiff by its acts has become an adopted creature of the State, enjoying the rights and privileges provided by its law, and is subject to the control thereof. The state accords it a right of eminent domain, and it becomes amenable to the Washington Public Service Commission Law. This law provides for establishing reasonable rates for public service. Provision is made for hearing and finding, and for review, Rem. C. 10428, before the Superior Court and for appeal to the Supreme Court from such judgment, R. C. 10430.

This court has jurisdiction by reason of the fifth and fourteenth amendments only. It has no revisory power and may not amend or modify a rate in the chancery sense, but is confined to the judicial determination of the controversy on the facts, and may not enter the administrative or legislative issue, Public Utilities, etc. v. Potomac Elec. Power Co. U. S. Supreme Court, April 9, 1923. I also desire to say that in my opinion the majority of the Commission have the right conception that consideration should be given to the $2,500,000 (round numbers) in the depreciation surplus fund, and an adjusted

compensation for the 4½ per cent contract with the Parent Company. Whether the proper consideration was given is not now before the court.

(Signed) Jeremiah Neterer.

[File endorsement omitted.]

[fol. 164] IN THE DISTRICT COURT OF THE UNITED STATES

No. 166-E

[Title omitted]

MOTION TO COMPEL ANSWER—Filed July 5, 1923

To the Honorable E. E. Cushman, Judge of the above entitled court:

Comes now The Pacific Telephone and Telegraph Company, a corporation, plaintiff above named, and moves the court for an order requiring the defendants above named to file forthwith with the Clerk of this court, an answer to the bill of complaint in the above entitled cause and serve the same upon the plaintiff herein, or in the default thereof that a decree pro confesso be entered against said defendants.

This motion is based upon the following grounds, to-wit:

That plaintiff's bill of complaint was filed herein on the 24th day of April, 1923, and was on the 26th day of April, 1923, duly served upon the defendants herein; that thereafter, to-wit, on the [fol. 165] 8th day of May, 1923, the plaintiff at the request of defendant, extended, by stipulation, the time of defendants to answer said bill of complaint to and including the 18th day of June, 1923, and no further; that said defendants have not filed or served any answer to said bill of complaint.

That there is no justification or reason arising from any act of the plaintiff or from the facts in this case, which would relieve the defendants from serving and filing the answer to plaintiff's bill of complaint as required by law, and the rules of the court, nor does the order heretofore entered in this cause on April 30, 1923, by its terms, relieve said defendants from serving and filing an answer to said bill of complaint, nor are said defendants relieved from serving and filling an answer to said bill of complaint during the pendency in the Superior Court of the State of Washington, in and for Thurston County, of a certain cause entitled "The State of Washington, ex rel., The City of Seattle, a municipal corporation, Petitioner and Relator, v. E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank H. Spinning, as Supervisor of Transportation of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington, exercising jurisdiction

in the Division of Public Utilities under the 'Public Service Commission Law'; and The Pacific Telephone and Telegraph Company, a corporation, Respondents."

This motion is further based upon all the files and records filed in said cause.

Otto B. Rupp, Post, Russel and Higgins, Pillsbury, Madison & Sutro, Solicitors for Plaintiff.

[File endorsement omitted.]

[fol. 166] In the District Court of the United States

[Title omitted]

Order Denying Motion to Compel Answer—Filed July 9, 1923

On the 9th day of July, 1923, there came on regularly for hearing on application of plaintiff, defendants' motion to dismiss heretofore filed herein, and plaintiff's motion for an order requiring defendants to answer plaintiff being represented by Otto B. Rupp, Esq., Post, Russell & Higgins, Pillsbury, Madison & Sutro and W. V. Tanner, Esq., and defendants being represented by Hon. John H. Dunbar, Attorney General and other counsel, and the court having heard argument of counsel, and being fully advised herein.

It is now ordered that said motion to require the defendants to answer be and the same is hereby denied, and the court declines to pass upon defendants' motion to dismiss, said rulings being based upon the reasons stated in the opinion filed herein May 23, 1923.

This order is made without prejudice to the defendants' rights to file any motion to dismiss or abate the action by reason of any matters occurring after its commencement. To all of which plaintiff excepts and its exception is allowed.

Dated, Tacoma, Washington, July 9, 1923.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 167] In United States District Court

Copy of Journal Record of October 22, 1923, Showing Order Disposing of Order of July 9, 1923

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on October 22nd, 1923, the Honorable Edward E. Cushman, United States District Judge presiding, among other proceedings had, were the following, truly taken and correctly copied from the Equity Journal record of said Court as follows:

[Title omitted]

Now on this 22nd day of October, 1923, it is ordered that the Order of July 9, 1923 formerly made in this cause be set aside and vacated and the motion of defendants to dismiss the Bill of Complaint is set down for hearing on Monday, October 29, 1923, at 10 o'clock A. M., and the Clerk is instructed to advise all parties of this order by mail.

[fol. 168] In the District Court of the United States

[Title omitted]

Affidavit in Support of Motion to Dismiss—Filed October 29, 1923

E. V. Kuykendall being first duly sworn on oath deposes and says: That he is the duly appointed, acting and qualified Director of the Department of Public Works; that on April 28, 1923, The Pacific Telephone and Telegraph Company, a corporation, plaintiff herein, filed a tariff with the Department of Public Works of the State of Washington known as Tariff W. D. P. W. No. 4, providing exchange rates and charges for other services in the cities of Seattle and Tacoma, Washington, and its tariff which names inter-exchange rates applying upon intrastate traffic within the State of Washington and upon interstate traffic; that subsequent thereto action was taken on said tariff by the Department of Public Works as more fully set up and described in the Findings of Fact and Order of the Department of Public Works, No. 5547, which is in words and figures as follows, to-wit:

[fol. 169] "Before the Department of Public Works of Washington

No. 5547

The Department of Public Works of Washington, Complainant,

v.

The Home Telephone and Telegraph Company of Spokane and The Pacific Telephone and Telegraph Company, Respondents.

Findings of Fact and Order

This cause was set and duly noticed for hearing on the 24th day of October, 1923, by the Department. The respondents made no formal appearance and no testimony in support of the tariffs hereafter referred to was submitted. The Department being fully advised in the premises makes and enters the following findings and order:

Findings of Fact

I

On September 20, 1922, the respondents filed with the Department exchange rate schedules proposing revised increased rates applicable to all exchanges of these companies in the State of Washington.

II

On September 24, 1922, the Department issued an order suspending the effective date of such rates and directing that the companies file for consideration of the Department a toll rate schedule conforming in principle to their prewar toll rate schedules.

III

[fol. 170] On October 5, 1922, the said telephone companies filed the toll rate schedules as directed and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed increased rate schedules except as applying to Seattle, Spokane and Tacoma. Protests against the said schedules were filed by each and all of said cities, and the same were suspended by order of the department, and after extensive investigations and hearings, the department entered an order on the 31st day of March, 1923, denying such increases and permanently suspending such tariffs.

IV

On the 28th day of April, 1923, the Home Telephone and Telegraph Company of Spokane, respondent, filed with the department its Tariff W. D. P. W. No. 4, providing exchange rates and charges for other services in the City of Spokane, Washington, and the Pacific Telephone and Telegraph Company, respondent, on the same date filed its Tariff W. D. P. W. No. 4, providing exchange rates and charges for other services in the cities of Seattle and Tacoma, and its tariff naming interexchange rates applying upon intrastate traffic within the State of Washington, and upon interstate traffic, all to become effective May 28, 1923. It appearing that the said tariffs named rates in excess of those in effect, the department issued an order suspending the effective date of each and all of said tariffs for a period of ninety days from May 28, 1923. A second suspension order of similar character was entered by the department on the 18th day of August, 1923, further suspending the effective date of said rates for the period of sixty days from August 25, 1923, or to and including October 25, 1923.

[fol. 171]

V

On October 15, 1923, the Department gave due and legal notice of a hearing in respect to said tariffs at Olympia, Washington, at the hour of 10:00 o'clock A. M., on October 24, 1923.

VI

On October 19, 1923, the said respondents, by their attorney Otto B. Rupp, submitted to the Department of Public Works a statement in writing in words and figures as follows, omitting title and signature, to-wit:

"On October 16, 1923, there was served on the agent of the company at Olympia, Washington, a 'Notice of hearing re Tariffs covered by our suspension orders dated May 25, 1923, and August 18, 1923, increasing telephone rates particularly in Seattle, Tacoma and Spokane, at Olympia on October 24, 1923, at the hour of ten A. M.'

Your Honorable Body will recall that on April 24, 1923, the Pacific Telephone and Telegraph Company brought a suit in the United States District Court for the Western District of Washington, Southern Division, in which it sought, among other things, to enjoin the enforcement of an order made by your Honorable Body on March 31, 1923, and that on April 24, 1923, that court issued an order in which, among other things, it restrained your Honorable Body, the Attorney General of the State of Washington and all other persons from interfering with or preventing the company from immediately putting into effect the rates and charges set forth in a schedule marked 'Exhibit F' and attached to the bill of complaint filed in that case.

After the issuance of this order, and on April 28, 1923, the company filed with your honorable body the rates and charges set forth in said schedule 'Exhibit F.' At the time the company filed such rates and charges, it notified your honorable body in writing that the schedule 'is made effective May 1, 1923, under the authority of an order issued April 24, 1923, by the District Court of the United States for the Western District of Washington, Southern Division, in cause No. 166-E.'

Your Honorable Body on the same date stamped on said schedule the following: 'Tariff accepted as tendered for filing.'

[fol. 172] On April 30, 1923, a court convened as provided for by Section 266 of the Judicial Code of the United States, dissolved the restraining order issued by Judge Cushman on April 24, 1923.

The company has always conside-d, and has so stated in open court, that the filing of such schedule was but a step taken by it in rendering effective the restraining order issued on April 24, 1923, and the three-judge court convened as above stated so held in an opinion rendered by that court and filed on May 23, 1923, in the case above referred to.

The company never did charge its patrons the rates set forth in said schedule 'Exhibit F,' for the reason that prior to the filing of said schedule, the restraining order which was the basis of the filing of said schedule, was dissolved.

In order to remove all doubt as to the company's position, the company does hereby state that the dissolution of the restraining order ipso facto cancelled the filing made as aforesaid on April 28, 1923, and that the rates and charges set forth in schedule 'Exhibit F' never became the effective rates and charges."

On the same date a statement was submitted identical with that above quoted with the exception that the Home Telephone and Telegraph Company of Spokane is named wherever the Pacific Telephone and Telegraph Company is mentioned in the above quoted statement. The said written statements, and each of them, duly signed by Otto B. Rupp, attorney for each of the said respondent companies, were filed with this Department on October 20, 1923.

VII

That the tariffs referred to in the above mentioned written statements as having been issued by the authority of an order issued April 24, 1923, by the District Court of the United States for the Western District of Washington, Southern Division, Cause No. 166-E and Cause No. 167-E, constitute the same tariffs and schedules involved in this controversy and mentioned in the suspension orders heretofore recited.

[fol. 173]

VIII

That the rates prescribed in the said tariffs never became effective and could not legally take effect unless and until a rehearing had been granted in Cause No. 5344 wherein the Department denied increased rates to the respondents and permanently suspended tariffs contained proposed increases. No rehearing in the aforesaid cause has been granted by this department, and the written statements filed herein by respondents above quoted clearly indicate that the filing of the said proposed tariffs and schedules as of April 28, 1923, was not in the nature of a request for a rehearing by this department in said Cause No. 5344, and was not intended to bring about a modification by the department of its own order entered in said cause.

IX

The respondents have failed to show by competent evidence or at all that the said proposed increased rates, fares, charges or tolls are just or reasonable and have failed to sustain the burden of proof resting upon the respondents to show that the proposed rates, fares, charges, or tolls are just and reasonable.

X

The department finds that the proposed rates, fares, charges and tolls contained in said tariffs, are unfair, unjust, excessive and unreasonable.

[fol. 174]

Order

Wherefore it is ordered that the said applications of respondents for increased rates be and the same are hereby denied. That the proposed rates embraced in said tariffs and schedules heretofore referred to and filed on April 28, 1923, in their entirety be and

they are hereby permanently suspended. That the same shall not become effective and existing rates shall remain in effect until the further order of the department.

Witness, the Department of Public Works of Washington this 24th day of October, 1923.

The Department of Public Works of Washington, by E. V. Kuykendall, Director. Frank R. Spinning, Supervisor of Transportation. E. V. Kuykendall, Director. Attest: Sam L. Crawford, Secretary.

Subcribed and sworn to before me this 27th day of October, 1923. R. E. Ostrander, Notary Public residing in Thurston County, Washington.

(Seal)

[File endorsement omitted.]

[fol. 175] Copy

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DECREE—Filed January 5, 1924

This cause having come on regularly for hearing in this court on the 31st day of December, 1923, upon the defendants' motion to dismiss the bill of complaint filed herein, plaintiff being represented by Messrs. Otto B. Rupp and W. V. Tanner, its solicitors, and the defendants being represented by John H. Dunbar, Attorney General of the State of Washington, and Raymond W. Clifford, his assistant, and Messrs. H. C. Brodie, Thomas J. L. Kennedy and E. K. Murray, their solicitors, and after hearing the arguments of counsel for the respective parties, the court having announced its oral opinion and decision that the motion to dismiss should be sustained upon the grounds that the bill of complaint herein does not state any matters of equity entitling the complainant to the relief prayed for; that said bill of complaint does not state facts sufficient [fol. 176] to entitle complaint to any relief against the defendant; and that said bill has been prematurely brought, by reason of the failure to exhaust the right of plaintiff to relief in the Superior and Supreme Courts of the State of Washington;

Now, on this 5th day of January, 1924, the parties herein now appearing by their respective counsel, on motion of the defendants, pursuant to such decision of the court, it is by the court hereby ordered, adjudged and decreed that said motion to dismiss be and it is hereby granted, and that said bill of complaint and this cause

of action be and the same hereby are dismissed, and that the defendants have and recover their costs and disbursements herein.

To the foregoing, and each and every part thereof, the plaintiff excepts and its exception is allowed.

Done in open court this 5th day of January, 1924.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 177] In the District Court of the United States

[Title omitted]

Assignment of Errors—Filed January 15, 1924

Comes now The Pacific Telephone and Telegraph Company, a corporation, plaintiff in the above entitled cause, and files the following Assignment of Errors on which it will rely on its appeal from the decree entered in the above entitled cause on the 5th day of January, 1924:

I

The court erred in sustaining defendants' motion to dismiss the bill of complaint in the above entitled cause, upon the ground that said bill of complaint does not state any matters of equity entitling the plaintiff to the relief prayed for.

[fol. 178]

II

The court erred in sustaining defendants' motion to dismiss the bill of complaint in the above entitled cause, upon the ground that said bill of complaint does not state facts sufficient to entitle plaintiff to any relief against the above named defendants.

III

The court erred in sustaining defendants' motion to dismiss the bill of complaint, upon the ground that said bill was prematurely brought, by reason of plaintiff's failure to exhause its right to relief in the Superior and Supreme Courts of the State of Washington.

IV

The court erred in making and entering the decree of January 5, 1924, dismissing the bill of complant and the cause of action herein.

V

The court erred in refusing to hold that the order of the Department of Public Works of Washington, rendered March 31, 1923, deprives plaintiff of its property without due process of law, contrary

to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VI

The court erred in holding that the order of the Department of Public Works of Washington, rendered March 31, 1923, was not the final legislative act under the laws of the State of Washington.

VII

The court erred in holding that Chapter 182 of the Session Laws of the State of Washington for the year 1913 is not, in so far as it purports to confer legislative power upon the courts of the State [fol. 179] of Washington, in violation of and contrary to Article II, Section 1, and Article IV, Section 1, of the Constitution of the State of Washington.

VIII

The court erred in holding that the pendency of a certain cause in the Superior Court of the State of Washington for Thurston County, entitled: "The State of Washington ex rel. The City of Seattle, a municipal corporation, Petitioner and Relator, v. E. V. Kuykendall, Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington, exercising jurisdiction in the Division of Public Utilities under the 'Public Service Commission Law;' and The Pacific Telephone and Telegraph Company, a corporation, Respondents," requires that this suit, pending in the United States District Court for the Western District of Washington, Southern Division, be stayed.

IX

The court erred in not holding that Chapter 182 of the Session Laws of the State of Washington for the year 1913 is contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, so far as said Chapter 182 precludes a determination of the value of the property of the above named plaintiff as of the time when an inquiry was made by the Department of Public Works of the State of Washington in 1923 regarding rates.

Wherefore, in order that the foregoing Assignment of Errors may be and appear of record, plaintiff presents the same to the court and [fol. 180] prays that such disposition may be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided; and plaintiff prays that said decree of January 5, 1924, be reversed, set aside and held for naught.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Plaintiff. W. V. Tanner, Of Counsel.

[File endorsement omitted.]

[fol. 181] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed January 15, 1924

The above named, The Pacific Telephone and Telegraph Company, feeling itself aggrieved by the decree rendered in the above entitled cause on the 5th day of January, 1924, dismissing the Bill of Complaint and cause of action in said cause, does hereby appeal from said decree to the Supreme Court of the United States, and prays that this, its appeal, may be allowed and that a transcript of the record and proceedings in said cause, and all things concerning the same, upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States in order that the errors complained of in the Assignment of Errors herein filed by said The Pacific Telephone and Telegraph Company may be [fol. 182] reviewed, and if error be found, corrected acording to the laws and customs of the United States.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Petitioner. W. V. Tanner, of Counsel.

[File endorsement omitted.]

[fol. 183] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

[File endorsement omitted.]

ORDER ALLOWING APPEAL—Filed January 15, 1924

It is hereby ordered that the appeal prayed for by the above named plaintiff in the above entitled cause to the Supreme Court of the United States, be and the same hereby is allowed as prayed.

Done in open court this 15 day of January, 1924.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 184] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER FIXING AMOUNT OF BOND ON APPEAL—Filed January 15, 1924

On reading the petition of the above named plaintiff in the above entitled cause, for the allowance of an appeal to the Supreme Court

of the United States from a decree rendered in said cause on January 5, 1924, dismissing the bill of complaint and cause of action in said cause, it is ordered that the plaintiff above named execute and file in the office of the Clerk of the above entitled court a bond on appeal conditioned according to law, in the sum of one thousand dollars with good and sufficient surety to be approved by the undersigned.

Done in open court this 15 day of January, 1924.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fols. 185 & 186] [Title omitted]

Bond on Appeal for $1,000—Approved and filed January 15, 1924; omitted in printing

[fols. 187-189] [Title omitted]

Citation in Usual Form Showing on J. H. Dunbar and R. W. Clifford—Filed January 15, 1924; omitted in printing

---

[fol. 190] In the District Court of the United States

[Title omitted]

Precipe for Record on Appeal—Filed January 26, 1924

To the clerk of the above entitled court:

Please make and certify on appeal to the Supreme Court of the United States a record which includes the following files, to-wit:

1. Bill of Complaint and Exhibits;

2. Subpœna and Marshal's return thereto;

3. Temporary Restraining Order;

4. Affidavits of C. T. Blanck, C. S. Cassassa, P. H. Coolidge, C. E. [fol. 191] Fleager (2 thereof), Henry L. Gray, Ralph H. MacMichael, J. C. Nowell, W. J. Phillips, offered in evidence by plaintiff in support of its application for an interlocutory injunction;

5. Motion of defendants to dismiss plaintiff's complaint;

6. Motion of defendants to dissolve restraining order, together with affidavit attached thereto;

7. Motion of defendants to stay proceedings in the above entitled suit and exhibit thereto attached;

8. Affidavit of E. C. Ridley filed in opposition to application for interlocutory injunction;

9. Order of April 30, 1923, denying interlocutory injunction;

10. Opinion filed May 23, 1923, an application for interlocutory injunction;

11. Motion filed July 5, 1923, to compel defendants to answer;

12. Order of July 9, 1923, denying said motion;

13. Order of October 22, 1923, vacating order of July 9, 1923, and fixing hearing on motion to dismiss;

14. Affidavit of E. V. Kuykendall dated October 27, 1923, in support of defendants' motion to dismiss.

15. Decree of January 5, 1924;

16. Assignment of Errors;

17. Petition for Allowance of Appeal;

18. Order Allowing Appeal;

[fol. 192] 19. Order Fixing Amount of Bond on Appeal;

20. Bond on Appeal;

21. Citation;

22. Acceptance of Service;

23. This Præcipe and acknowledgment of service thereto attached.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Plaintiff. W. V. Tanner, of Counsel.

Due, regular and timely service of the foregoing Præcipe is hereby acknowledged this 23rd day of January, 1924.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 193] UNITED STATES OF AMERICA,
Western District of Washington, ss:

CLERK'S CERTIFICATE

I, F. M. Harshberger, Clerk of the District Court of the United States of America, for the Western District of Washington, do hereby certify and return to the claim of appeal of The Pacific Telephone and Telegraph Company, from a certain Decree dated January 5, 1924, in a cause pending in said court wherein The Pacific Telephone and Telegraph Company, a corporation, is plaintiff, and E. V. Kuykendall, as Director of Public Works of Washington,

Hance C. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of Washington, and John H. Dunbar, Attorney General of the State of Washington are defendants, that the above and foregoing and within transcript of record, pages numbered 1 to 196 inclusive, is a true copy of all papers filed and proceedings had and entered in said cause as the same appear on file and of record in my office; that I have compared the same with the originals, and they are true and correct transcripts therefrom and of the whole thereof.

I further certify that I hereto attach and herewith transmit the original citation in said cause with acceptance of service on said writ.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges as incurred and paid in my office by and on behalf of appellant herein, for making record, certificates and return to the Supreme Court of the United States in the above entitled cause, to-wit:

[fol. 194] Filing appeal papers, orders, etc., and issuing Citation	$7.00
Clerk's Fees (Sec. 828 R. S. U. S.) for making record, Certificate and return, 751 folios @ 15¢	112.65
Certificate of clerk to record, 4 folios at 15¢ and seal	.80
Total	$120.45

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Tacoma, in said District, this 29th day of January, in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the United States the one hundred and forty-eighth.

F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, by Ed. M. Lakin, Deputy. (Seal of the United States District Court, Western District of Washington.)

[fols. 195 & 196] Duplicate citation omitted.

Endorsed on cover: File No. 30,099. W. Washington D. C. U. S. Term No. 789. The Pacific Telephone and Telegraph Company, appellant, vs. E. V. Kuykendall, as Director of Public Works of Washington, et al., etc., et al. Filed February 4th, 1924. File No. 30,099.

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WM. R. STAN
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Nos. 540 and 790.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant,*

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees.*

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

Brief and Argument of Appellant.

C. M. BRACELEN,
W. V. TANNER,
Of Counsel.

OTTO B. RUPP,
FRANK T. POST,
H. D. PILLSBURY,
Solicitors for Appellant.

Law Brief Printing Co., Seattle

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Nos. 540 and 790.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

Brief of Appellant.

Statement.

There are involved in this case two appeals: one, from an order made on April 30, 1923, by Honorable William B. Gilbert, Circuit Judge, and Honor-

able Edward E. Cushman and Honorable Jeremiah Neterer, District Judges, sitting as a statutory court under section 266 of the Judicial Code, which order denied an application made by The Pacific Telephone and Telegraph Company, appellant here, for an interlocutory injunction restraining the enforcement of a rate order made on March 31, 1923, by the Department of Public Works of Washington; the other, an appeal from a final decree signed by Judge Edward E. Cushman, District Judge, and entered on January 5, 1924, dismissing the complaint of the appellant company.

Inasmuch as the questions involved in these two appeals are substantially the same, it would seem that it would be but an added burden on the court to compel it to read a separate brief in each appeal. We shall, therefore, file but one brief.

A statement of the facts of the controversy follows:

The appellant (hereinafter referred to as the "company") is engaged in a general telephone and telegraph business in the State of Washington and elsewhere; the rates it charges for telephone service are subject to regulation by the State of Washington.

On August 8, 1919, the Public Service Commission of that State, now the Department of Public Works (hereinafter referred to as the "department") made an order prescribing the maximum rates to be charged by the company for its service, both exchange and toll, in Washington. These rates remained in effect until September 20, 1922, when the company filed a schedule advancing all its *exchange* rates in the State of Washington. The state law authorizes the department to suspend rate increases pending an investigation of their reasonableness. (Remington's Compiled Statutes, 1922, Sec. 10424.) The department issued an order suspending, for the full statutory period, the operation of these increased rates and directing the company to file a new toll rate schedule conforming in principle with the toll rates which had been effective prior to the war period.

On October 5, 1922, the company filed, as directed, the toll rate schedule and withdrew and cancelled the exchange rate schedule filed on September 20th except the rates and charges applicable to the cities of Seattle and Tacoma. In effect, what the company did on October 5th was to file a schedule increasing the exchange rates in Seattle and Tacoma and, under certain circumstances, toll rates through-

out the State, but leaving all other exchange rates the same as they had been at all times since August, 1919.

Thereafter hearings were held by the department at various times and places throughout the State.

On March 31, 1923, the department made an order—one member, the Supervisor of Public Utilities, dissenting—whereby the application of the company for increased rates in Seattle and Tacoma and for a new toll rate schedule was denied.

This order was preceded by certain findings of fact made by the department, the first one of which purported to determine the value of the used and useful property of the company in the State. (Transcript, p. 41.)

Parenthetically, it may be said that the statutes of the State of Washington, as construed by the Supreme Court of that State, provide that if the regulatory body of the State has at one time valued the property of a utility, the value of the property of such utility at any subsequent date shall be determined by adding to the original valuation the net additions and betterments since made to that property. (*State ex rel. Spokane Falls Gas Light Company v. Kuykendall*, 119 Wash. 107.) Inasmuch

as the company's property had been valued by the regulatory body in 1914, the department followed the course prescribed in the statute as construed by the Supreme Court. In short, it determined the value of the company's property in 1923 by adding to the original valuation made in 1914 the net additions and betterments made to that property since that date.

The state law authorizes a judicial review of a rate order in the state courts, provided that proceedings for such review are initiated within thirty days after service of the order. (Rem. Comp. Stat., 1922, Sec. 10428.)

The company did not sue out a writ of review within thirty days, nor has it ever brought any proceedings in the state court attacking the order of March 31, 1923.

The company did, however, on April 24, 1923, file a complaint in the United States District Court for the Western District of Washington, Southern Division, over which Judge Cushman presides, in which it alleged, *inter alia*, the filing of the rate schedule of August 8, 1919, the filing of the rate schedule of September 20, 1922, the suspension of this last named schedule by the department, the

filing of the schedule of October 5, 1922, and the making of the order by the department of March 31, 1923.

The company further alleged that the cost of its property in the State of Washington and the cost of its property in the cities of Seattle and Tacoma was substantially the rate base fixed by the department in its order of March 31, 1923; that these amounts were, for the State, the sum of $29,347,-254, for Seattle $17,023,372, and for Tacoma $2,-888,021; that the fair value of its property in the State was $35,616,896, in Seattle $20,852,062, and in Tacoma $3,457,290; that under the schedule of rates in effect during the year 1922, and which schedule was continued in effect by the order of March 31, 1923, the company had earned in 1922 upon the *cost* of its property in the State 3.17 per cent, in Seattle .19 per cent, and in Tacoma .89 per cent; that upon the fair value of its property under such schedule it had earned in 1922 in the State 2.58 per cent, in Seattle .15 per cent, and in Tacoma .75 per cent; that if the order of March 31, 1923, was enforced it would be prevented from earning any return in excess of 2.11 per cent per annum upon the fair value of its property in the State, .54 per cent *loss* per annum upon the fair value of its

property in Seattle, and .56 per cent per annum upon the fair value of its property in Tacoma; that had the rates found by the Supervisor of Public Utilities in his dissenting opinion of March 31, 1923, to be just, fair and reasonable rates, been in effect throughout the year 1923, the return to the company on the fair value of its property would have been, for the State 5.09 per cent, for Seattle 2.81 per cent, and for Tacoma 3.96 per cent; that for the same period, the return upon the cost of its property would have been, for the State, 6.15 per cent, for Seattle 3.42 per cent, and for Tacoma 4.73 per cent; and that such rates were *less* than just and reasonable rates, but that the company proposed to establish and put into effect such rates pending the final decree in the case.

It prayed, therefore, that the rates prescribed in the order of March 31, 1923, be decreed to be confiscatory, in violation of the Constitution of the United States, and that it be permitted to put in force the schedule of rates found by the dissenting member of the department to be just and reasonable until such time as just and reasonable rates and charges were established according to law. (Transcript, pp. 1 to 10.)

On the same date that the complaint was filed, the company applied to Judge Cushman for a temporary restraining order, which order was granted on that date. A copy of this order appears on page 92 of the printed transcript in case numbered 540 and on the same page in case numbered 790. We may here say that the printed transcript in case numbered 790 is identical with the printed transcript in case numbered 540 for the first 164 pages.

Subpoenas were issued on the same date the restraining order was granted, and served on the defendants named in the complaint, appellees here, on April 25, 1923. Jurisdiction of the United States District Court over the cause had, therefore, fully vested on April 25, 1923.

On April 27, 1923, the City of Seattle sued out a writ of review in the Superior Court of the State of Washington for Thurston County, claiming that the rates fixed by the department's order of March 31, 1923, for Seattle were excessive. (Transcript, p. 135.) The rates for toll service throughout the State and the rates for Tacoma fixed by the department's order of March 31, 1923, are not attacked by this proceeding of the City of Seattle.

It will at once occur to this court that the proceeding brought by the City of Seattle is not such a proceeding as is described in the amendment of March 4, 1913 (37 Stat. 1013), to section 266 of the Judicial Code, the effect of which would be to stay all proceedings in the suit brought by the company in the United States District Court, for this proceeding brought by the City of Seattle was *not* brought to *enforce* the order, but to *attack* it; nor was the order of March 31, 1923, stayed by any order in the Thurston County case.

The application for an interlocutory injunction came on to be heard before Judge Gilbert, Judge Cushman and Judge Neterer on April 30, 1923. At that time the department and the Attorney General filed three motions, one to dismiss the complaint, another to dissolve the restraining order, and the third to stay all proceedings in the suit instituted by the company in the United States District Court on April 24, 1923. (Transcript, pp. 125, 126, 134.)

After argument was concluded on April 30th, the statutory court entered an order dissolving the restraining order, denying the interlocutory injunction, and stated that an opinion would be filed later. (Transcript, p. 149.)

The opinion was filed on May 23, 1923. It states, in substance, that the proceeding instituted by the City of Seattle in the Thurston County court was not one brought to enforce the order of the department on March 31st, and therefore does not fall within the amendment to section 266 of the Judicial Code; that there was no need for the company to apply to the department for a rehearing of the rate order before it brought the suit in the United States District Court; that under the statutes of the State of Washington the courts of that State in reviewing a *rate* order, act in a *judicial* capacity because the state courts are given no power by the section of the statute relating to the review of a rate order to make their own findings or fix rates, and, consequently, so far as the rate order of March 31, 1923, was concerned, the suit in the United States District Court was not prematurely brought.

It states further, however, that the complaint filed in the United States District Court shows that there is a controversy as to the value of the property of the company; that under the statutes of the State of Washington (Rem. Comp. Stat., 1922, Sec. 10441) the Superior Courts and Supreme Court of that State "have *legislative* authority in determining the rate base superior to that of the depart-

ment," and that " 'considerations of comity and convenience' require the court to hold that until plaintiffs have exhausted their right to relief in the Superior and Supreme Courts—relief, in part at least, legislative in character, these causes must be stayed." (Transcript, p. 161.)

The statutory court further held that if the company initiated a review proceeding in the state court and applied in that proceeding for a stay of the enforcement of the order of March 31st, and also applied for a stay in the proceeding brought by the City of Seattle in the Thurston County court, and such applications for stay were denied by the Superior Courts of the State of Washington and such denials affirmed by the state Supreme Court, then the company might renew its application in the United States Court for an interlocutory injunction. (Transcript, p. 162.)

It is at once apparent that the statutory court considered that the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, was controlling.

An appeal was taken by the company from the order of the statutory court denying the interlocutory injunction, and the same was docketed in this court as cause No. 540.

On July 5, 1923, the company filed a motion in the United States District Court for the Western District of Washington, Southern Division, for an order requiring the defendants named in the complaint, appellees here, to file forthwith, an answer to the complaint, or in default thereof that a decree *pro confesso* be entered against said defendants.

As hereinbefore stated, the appellees had on April 30, 1923, filed, among other motions, a motion to dismiss the complaint, on the ground that there was a want of equity in the complaint. No argument had ever been had up to that time on the motion to dismiss.

On July 9, 1923, after argument, the District Judge declined to consider or pass upon the motion to dismiss the complaint, and denied the motion to require the appellees to answer, specifically basing his ruling in both instances upon the reasons set forth in the opinion rendered by the statutory court and filed on May 23, 1923.

On August 2, 1923, the company sued out in the Circuit Court of Appeals for the Ninth Circuit a rule to show cause why the District Court should not proceed. The case was heard by the Circuit Court of Appeals on September 18, 1923. On

October 7, 1923, the case was decided by the Circuit Court of Appeals in favor of the company, and a writ of mandamus was issued by that court commanding the District Court to proceed forthwith. (The opinion of the Circuit Court is reported in 292 Federal Reporter at page 930.)

The District Court, upon receipt of the mandate, vacated the order of July 9, 1923, and assigned October 29, 1923, as the date for argument on the motion to dismiss the complaint.

For various reasons not necessary now to mention, argument on the motion to dismiss was not had until December 31, 1923. On that date, after argument, the District Judge, Honorable Edward E. Cushman, granted the motion to dismiss the complaint of the company on the ground, primarily, that the suit had been prematurely brought by reason of the failure of the company to exhaust its alleged right to relief in the Superior Courts and Supreme Court of the State of Washington.

A formal decree dismissing the complaint was signed by the District Judge and filed on January 5, 1924. Thereupon, an appeal was taken from that decree to this court and is docketed herein as cause No. 790.

Assignment of Errors.

There is some slight difference between the Assignment of Errors in case No. 540 and case No. 790, but the difference arises solely from the character of the action complained of. For convenience sake, however, all Assignment of Errors in both appeals may be summarized and grouped as follows:

I.

The judicial stage is reached whenever judicial intervention is necessary to obtain relief from confiscatory rates ordered by a regulatory body.

II.

Legislative power cannot constitutionally be vested in Washington state courts.

III.

The Washington state law expressly forbids a stay.

IV.

Wholly apart from constitutional questions, the legislative process in this case was complete prior

to the filing of the complaint in the United States Court.

V.

The complaint states a cause of action for injunctive relief.

Argument.

It is apparent that both the statutory court and the District Judge thought that this case was controlled by the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210.

It was held in that case that where the reduced rates had not taken effect and probably would not take effect until the Supreme Court of Appeals of Virginia could, on appeal from the order of the Virginia Commission, perform the legislative function, constitutionally vested in the court, of finally fixing rates "considerations of comity and convenience" required that the railroad companies should delay their application for relief to the United States courts until the legislative issues raised by the appeals were denied, or it became reasonably certain in some other way, as by dismissal of the appeals, that the prescribed rates would be put into operation.

In that case legislative power has been imposed by the Constitution of Virginia upon its state courts, and the order of the regulatory body was therefore not the final legislative act.

Again, in that case the property of the railroad company had not, at the time of the application to the United States court, been confiscated and its property would be confiscated only in the event that the reduced rates were finally put into operation. That case is not applicable to the facts in the case at bar for several reasons:

1. The judicial stage is reached whenever judicial intervention is necessary to obtain relief from confiscatory rates ordered by a regulatory body.

2. Legislative power cannot constitutionally be vested in the Washington state courts.

3. The Washington state law expressly forbids a stay.

4. Wholly apart from constitutional questions, the legislative process in this case was complete prior to the filing of the complaint in the United States court.

I.

THE JUDICIAL STAGE IS REACHED WHENEVER JUDICIAL INTERVENTION IS NECESSARY TO OBTAIN RELIEF FROM CONFISCATORY RATES ORDERED BY A REGULATORY BODY.

The *Prentis* case is based upon "considerations of comity and convenience." In that case there had been no present invasion upon the rights of the railroad companies. They had not lost a single dollar. In the case at bar, however, the company is now and has been suffering daily from confiscation under the rate to which it is now limited. Its constitutional rights have been invaded. "Rules of comity and convenience must give way to constitutional rights."

The case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is directly in point. The Constitution of Oklahoma, like that of Virginia, confers legislative power upon the courts. In that case there had been no final decision of the Supreme Court of that State which was the last legislative tribunal. This court held, however, that inasmuch as the utility was suffering daily from confiscation under the rate to which it was limited, the

statutory court should have heard the application for an interlocutory injunction upon the merits.

In support of this conclusion, this court cites *Love v. Atchison, Topeka & Santa Fe Ry. Co.*, 185 Fed. 321, which states very clearly the reasons supporting court intervention pending the completion of the legislative process. We quote from the *Love* case, page 327:

"The legislative function in rate-making looks to the future and determines what future rates shall be. But when rates, either tentative or final have been put and are maintained in actual operation under penalty of severe fines, the question whether or not their effect is to take the property of the railroad companies affected thereby without just compensation is a judicial one, conditioned by past or present facts, and the national courts cannot be deprived of jurisdiction of it by the fact that the process of making the tentative rates is yet incomplete. It is as clear a violation of the Constitution, and one as promptly remediable in the national courts, to take the property of a railroad company without just compensation by the enforced operation of tentative rates during the process of their making as by the operation of final rates after that process is complete. Railroad companies that have been, are, or will be deprived of parts of their property devoted to the public use of transportation without just compensation during the continuance of the rate-making process by provisions of a state Constitution or of a state law, or by orders of a

state commission, prescribing tentative rates and putting them in effect during the rate-making process under severe penalties, may maintain suits for and obtain relief by injunction during the continuance of the rate-making process to the same extent that they may after the process is completed. These suits were not prematurely brought."

The same question was again before this court in *Prendergast v. New York Telephone Co.*, 262 U. S. 43, where this court followed and cited with approval *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, and *Love v. Atchison, Topeka & Santa Fe Ry. C.*, 185 Fed. 321, and concluded as follows: "Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined *pending the continuance and completion of the rate making process.*" (Italics ours.)

We say again that there has been a present invasion of our constitutional rights, and that judicial intervention is necessary to obtain relief from such invasion. If judicial intervention is necessary to obtain relief, it is clear that the judicial stage is reached.

Where the utility is daily suffering confiscation it is not necessary that the legislative process be complete before a resort is had to the United States Courts.

The only distinction ever sought to be drawn by appellees between the case at bar and the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is that in the Oklahoma case an application was made to the Supreme Court of that State for a stay and such application denied. In fact, however, no such distinction exists, because, as we shall show later, the law of the State of Washington expressly forbids the courts of that State from granting a stay.

II.

LEGISLATIVE POWER CANNOT CONSTITUTIONALLY BE VESTED IN WASHINGTON STATE COURTS.

The statutory court in denying the interlocutory injunction and the District Court in dismissing the complaint did not hold that the state courts possessed legislative power in respect to the rate order of the department. The statutory court and the District Court based their action solely upon the fact that section 10441 of Rem. Comp. Stat., 1922, of Washington, imposes upon the state courts of Washington the *legislative* authority of determining the value of the property of public service companies operating in that state.

An examination of the Washington law is necessary. In the case of an order affecting *rates*, the statute provides for a *judicial* review of such order by the state courts. This is clear from the provisions of section 10428 of Rem. Comp. Stat. of Washington, 1922. That section provides that any complainant or public service company affected by a rate order may, within thirty days after the making of the order, sue out a writ of review in one of the superior courts of the State of Washington. It further provides for a hearing before such court and that "upon such hearing the superior court shall render judgment either affirming or setting aside the order of the commission under review."

Similar provisions are found in the regulatory acts of a majority of the states.

But an entirely different situation is presented when the provisions of the Washington statute relative to the determination of value are considered.

Section 10441 of Rem. Comp. Stat., 1922, directs the regulatory body to ascertain, as early as practicable, the value of every public service company subject to its jurisdiction. It then provides for a hearing at which the utility affected may be heard,

and for the making of findings of fact by the regulatory body, which findings shall cover in detail all matters which the legislature deemed material to the determination of value.

This valuation proceeding is independent of rate controversies.

The statute further provides that the utility, and the utility alone, may institute a suit in one of the superior courts of the State of Washington for the purpose of having the findings of the regulatory body reviewed, and that in case the Superior Court to which appeal has been made

"finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful, or not supported by the evidence [the court] *shall make new and correct findings* to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received."

The statute also provides that an appeal may be taken from the judgment of the Superior Court to the Supreme Court, and that

"in case the supreme court finds any findings so

sought to be reviewed unjust, incorrect, unlawful, or unreasonable, or not supported by the evidence, *it shall either make and render proper findings* or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received."

Further,

"the findings . . . . . shall be admissible in evidence in any action, proceeding or hearing . . . . . and such findings, when so introduced, shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing . . . . ."

(For the convenience of the court we set out in full sections 10428 and 10441 as an appendix to this brief.)

Now we concede that the review provided for in section 10441 is not a judicial review, and that this section is similar to paragraphs 6, 7 and 8 and the first sentence of paragraph 64 of the Public Utilities Act of the District of Columbia, and which sections of said Act were considered by this court in the case of *Keller, et al, v. Potomac Electric Power Company, et al*, 261 U. S. 428.

It was held in that case, among other things, that the act of Congress attempted to confer upon this court the power to make the order the Commission should have made, and that such power was legislative power.

In the case at bar it is clear that the legislature of the State of Washington has attempted to confer a like power upon the courts of that State.

But the question here for solution is, Could the legislature, under the Constitution of that State, vest legislative power in the courts?

There is no provision in the Constitution of the State of Washington similar or analogous to the provision in the Constitution of Virginia discussed in *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210.

On the contrary, the provisions of the Constitution of the State of Washington relative to the vesting of powers are almost identical with the provisions in that regard of the Constitution of the United States.

In the absence, therefore, of some declaration to the contrary by the Supreme Court of the State of Washington, the decision of this court in the case of *Keller, et al, v. Potomac Electric Power Company, et al*, 261 U. S. 428, is controlling.

The doctrine therein announced is supported by an almost unbroken line of authority starting at the very beginning of this Republic and extending to the present date. In confirmation of this statement, we cite the following cases:

Hayburn's Case, 2 Dall. 409, and note at p. 410;

The Pacific Tel. & Tel. Co. v. Cushman, District Judge, 292 Fed. 930;

Kilbourn v. Thompson, 103 U. S. 168, 190;

United States v. Ferreira, 13 How. 40, and note;

Helena Water Co. v. City of Helena, 277 Fed. 66, 68;

Oregon R. & Navigation Co. v. Campbell, et al, 173 Fed. 957;

Western Union Tel. Co. v. Myatt, 98 Fed. 335;

Ex parte Riebeling, 70 Fed. 310;

State ex rel. Godard v. Johnson, 61 Kan. 803;

In re Sims, 54 Kan. 1;

State ex rel. Taylor v. Missouri-Pacific R. R. Co., 76 Kan. 467;

Auditor of State v. Atchison, T. & S. F. R. Co., 6 Kan. 500;

Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 508;

City of Zanesville v. Telephone Co., 63 Ohio St. 442;

State ex rel. Montgomery v. Rogers, 71 Ohio St. 203;

Thompson v. Redington, 92 Ohio St. 101;

DeChastellux v. Fairchild, 3 Harris 18;

Buck's County Prison Board, 28 Pa. Co. Ct. 65,70;

Glaspell v. City of Jamestown, 11 N. D. 86;

Steenerson v. Great Northern Ry. Co., 69 Minn. 353;

State v. Great Northern Ry. Co., 130 Minn. 57;

State ex rel. Young v. Brill, 100 Minn. 499;

State ex rel. White v. Barker, 116 Iowa 96;

Norwalk St. Ry. Company's Appeal, 69 Conn. 576;

Nebraska Telephone Co. v. State, 55 Neb. 627;

Tyson v. Washington County, 78 Neb. 211;

State Racing Commission v. Latona Agricultural Assn., 136 Ky. 173;

City of Boston v. City of Chelsea, 212 Mass. 127;

Case of Supervisors of Election, 114 Mass. 247;

Butler v. State, 97 Ind. 373;

Ex parte Griffiths, 118 Ind. 83;

United Fuel Gas Co. v. Public Service Commission, 73 W. Va. 571;

In re County Commissioners, 22 Okla. 435;

Board of Supervisors v. Todd, 97 Md. 247;

Taylor & Co. v. Place, 4 R. I. 324, 345, 357, 358;

Bates v. Kimball, 2 D. Chip. (Vt.) 77;

Kimball v. Grantsville City, 19 Utah 368;

Houseman v. Kent, 58 Mich. 364;

Merrill v. Sherburne, 1 N. H. 199, 204.

But we are not without clear decisions of the Supreme Court of the State of Washington holding that the legislature cannot impose legislative functions upon the courts of that State.

In *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 110, the court said:

"We hold that a *judicial* court *cannot* exercise legislative functions and that the *legislature cannot impose such power upon it.*"

In *State ex rel. Seattle v. Public Service Commission*, 76 Wash. 492, 500, the court said:

"Manifestly, it is wholly impractical and *beyond the proper sphere* of the courts to assume to control in any degree this purely nonjudicial duty of the commission. Any attempt on the part of the courts

to do so would, it seems clear to us, be to enter the field of executive and administrative duties. *Such would be clearly subversive of our theory of government.*" (Italics ours.)

We quote from *In re Bruen*, 102 Wash. 472, at page 478:

"These functions being essentially judicial and inherent in the courts, we are of the opinion that the legislature has attempted to create a judicial tribunal which, at the same time, has administrative and delegated legislative powers. Such a system is not warranted under our constitutional form of government. The legislative, executive, and judicial functions have been carefully *separated* and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts." (Italics ours.)

See also:

Spokane v. Spokane and Inland Empire R. Co., 75 Wash. 651; 659;

Selde v. Lincoln County, 25 Wash. 198, 206;

Pacific Tel. & Tel. Co. v. Cushman, District Judge, 292 Fed. 930.

Since, as we have shown, legislative power cannot constitutionally be conferred upon the state courts of Washington, it is obvious that the legislative process terminated upon the making of the rate order of March 31, 1923.

III.

THE WASHINGTON STATE LAW FORBIDS A STAY.

It will undoubtedly be claimed that the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is not applicable because of the failure of the company to seek a stay of the rate order in the Washington state courts. But that case is not so distinguishable. As already stated, it would be useless for the company to ask either the Superior Court of Thurston County or the Supreme Court of the State of Washington to stay the enforcement of the order of March 31, 1923, because the state courts are expressly prohibited by statute from staying the enforcement of that order.

Section 10424, Rem. Comp. Stat., 1922, relating to the filing of tariffs increasing rates and providing for a hearing on such proposed increase and

the suspension of the schedule pending the hearing, declares that:

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court."

It is not open to question that this provision is plain, direct, positive and unambiguous.

Moreover, the granting of a stay is expressly prohibited by another provision of the Washington law. The rates approved by the department in its order of March 31, 1923, had been put in effect originally on August 1, 1919. The rates, therefore, on March 31, 1923, had been in effect *for more than one year.* On October 5, 1922, the company filed a schedule advancing the rates for telephone service in the cities of Seattle and Tacoma, and toll rates throughout the State. Section 10429, Rem. Comp. Stat., 1922, provides that:

"when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed

in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court, by such supreme court."

It is manifest, therefore, that even though the company had instituted review proceedings in the Superior Court of Thurston County and had applied in that proceeding and also in the proceeding brought by the City of Seattle in the Thurston County court for a stay, neither that court nor the state Supreme Court could have granted any relief to the company until after the final decision of the case upon its merits by the Supreme Court.

Since any application to the state court for a stay would not only have been futile, but also one which the company had not the legal right to make, the company should not have been required to make it as a condition precedent to its resort to the United States Court.

The case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is, therefore, not distinguishable from the case at bar, and the following language of the Circuit Court of Appeals in *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, is apposite:

"Again, if the petitioner was denied a supersedeas by the state or by the state courts, the rule

announced in the Oklahoma Gas Co. Case applies, and in this connection it is immaterial whether the supersedeas was denied by the court or by the supreme legislative authority of the state."

As indicated in the opinion of the Circuit Court of Appeals in the case of *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, appellees have heretofore sought to escape the plain provisions of sections 10424 and 10429, Rem. Comp. Stat., 1922, by asserting (a) that such provisions are unconstitutional, and (b) that the state courts of Washington have inherent power to grant a stay. These contentions merit but little consideration.

No reason has ever been assigned why the statutes in question should be held to be unconstitutional. We can conceive of no reason why the statutes should be held invalid. Moreover, how can the question as to whether the statutes are valid or not arise? We believe that the statutes absolutely deprive the state courts of the power to grant a stay, and that the statutes are valid. On what theory then can we ask the state courts for a stay? Are we to go into a court of justice and ask the court to grant to us a relief which we firmly believe the court has not the power to give?

With reference to the argument that the state courts have inherent power to grant a stay despite the express and positive provisions of the statutes to the contrary, we say that the state courts acting in a *legislative* capacity have no such power. Hence, if the state courts do have inherent power to grant such a stay, they have it wholly in the exercise of their general judicial power. But we may not safely apply to the state courts acting in a purely judicial capacity for relief. (*Detroit & Mackinac Ry. Co. v. Michigan R. R. Commission*, 235 U. S. 402.)

Moreover, appellees cannot assert that the state courts could in this case act in a judicial capacity, for the entire basis of their defense is that the court is acting in a legislative capacity.

Again the language of the Circuit Court of Appeals in *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, is pertinent.

"But it has been mildly suggested that this provision of the law may be declared unconstitutional by the Supreme Court of the state, or that the courts of the state might grant a supersedeas, notwithstanding the prohibition contained in the statute. We are not permitted to indulge in any such speculation where important constitutional rights are involved. No ground of unconstitutionality has

been suggested; the presumption is to the contrary, and in this case we think the presumption accords with the fact. In the exercise of appellate jurisdiction conferred by the Constitution, it may be that the Supreme Court of the state has inherent power to grant a supersedeas to the end that its appellate jurisdiction may not be defeated; but however that may be, where, as here, the appeal is wholly statutory, jurisdiction may be conferred or withheld at the pleasure of the Legislature."

IV.

WHOLLY APART FROM CONSTITUTIONAL QUESTIONS, THE LEGISLATIVE PROCESS IN THIS CASE WAS COMPLETE PRIOR TO THE FILING OF THE COMPLAINT IN THE UNITED STATES COURT.

(1) As already stated, section 10441 Rem. Comp. Stat., 1922, provides for a general investigation and the making of findings concerning matters material to the determination of the valuation of a public utility. These findings may be reviewed and corrected by the courts, and as made or corrected "when properly certified under the seal of the commission" are "admissible in evidence in any action, proceeding or hearing," and are "conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing."

The findings relative to the value of the company's property which were introduced in evidence in the hearing of 1923 before the department, were made in 1914. These findings have not been reviewed.

If we assume, for the sake of the argument only, (a) that legislative power may be imposed upon courts in the State of Washington, (b) that the Washington state courts may determine value in accordance with the principles enunciated by this court (which, as a matter of fact, they may not do), and (c) that the valuation findings are now subject to review in the state courts, nevertheless a review of such findings at this time would not affect the rate order of March 31, 1923, which became final, so far as resort to the state courts was concerned, by the failure to review that order within the thirty day period provided by the state statute.

The rule that the rate making process may become final so as to permit resort to the United States courts *by the failure of the utility to invoke the action of the final state legislative authority* under the provisions of the state law, is recognized in the *Prentis* case. The court there declined to proceed until the final action of the legislative

authority of the State, namely, the Supreme Court of Appeals of Virginia. Attention was directed, however, to the provisions of the Virginia law requiring appeals to be taken within six months from the date of the order of the primary regulatory body, and to the fact that it might be found in that case that it was too late to appeal. The court, in consequence, declined to dismiss the bills, holding that they should be retained to await the result of the appeals, "if the companies see fit to take them," and that "if the appeals are dismissed as brought too late, the companies will be entitled to decrees."

In the case now before the court, the company did not within thirty days sue out, nor has it ever sued out a writ to review the order of March 31, 1923. The time within which such proceedings might have been begun expired on April 30, 1923, the day on which the application for an interlocutory injunction was argued. It is manifest that under the provisions of the state law, the company cannot now institute any proceeding in the state court by which it might obtain relief.

Considering, therefore, for the moment that in respect to valuation findings the state courts of Washington do possess legislative power, nevertheless the proceedings in this case have reached the

judicial stage within the rule announced in the *Prentis* case.

(2) One of the controversies between the company and the department is whether the value of the company's property is to be determined in accordance with the principles enunciated by this court or in accordance with the statute of the State of Washington as construed by the Supreme Court of that State, which statute so construed is in conflict with these principles. The statute, section 10441, Rem. Comp. Stat., 1922, as construed by the Supreme Court of Washington in the case of *State ex rel. Spokane Falls Gas Light Co. v. Kuykendall*, 119 Wash. 107, provides that when the regulatory body has once valued the property of a public utility, the value of any such property at any subsequent date must be determined by adding to the original valuation the net additions and betterments made to that property since the original valuation. This was the method pursued by the department in this case, as shown by the following excerpt from Finding No. 1 of the findings made by the majority members of the department and an identical finding made by the dissenting member of the department in his opinion:

"As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring

up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922." (Transcript, pp. 41, 58.)

But this court has decided time and time again that the value of the property of a public utility is to be determined as of the time when the inquiry regarding rates is made.

We need cite on this proposition only the two recent cases of *State ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U. S. 276, and *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 262 U. S. 679.

Section 10441, therefore, as construed by the Supreme Court of Washington, is in contravention of the due process clause of the United States Constitution. It follows that the judicial stage of the proceeding was reached when the order of the department was made, and that resort might then be had to the United States District Court.

(3) Again, assuming for the sake of argument only, that legislative power may be imposed upon the state courts of Washington and that the courts of that State may apply the rule prescribed by this court for determining value, nevertheless in decid-

ing whether in any particular controversy the court is acting judicially or non-judicially, the test to be applied is that "The nature of the final act determines the nature of the previous inquiry." (*Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 227.)

If a regulatory body is empowered to determine value in the exercise and aid of its general authority, independent of a rate proceeding, then the action of a reviewing court, having the power to substitute a different value, is legislative. But if a court is reviewing the valuation in a rate case in order to determine whether the rates prescribed by the regulatory body are confiscatory or not, the action of the reviewing court is judicial, unless it has authority to substitute other rates for those found by the regulatory body which authority the courts of the State of Washington clearly do not have.

In the case at bar, the order of March 31st establishes certain rates. If that order was reviewed in the state courts, those courts could not fix a new rate. The sole act which that court could perform would necessarily be judicial. The judicial stage, therefore, having been reached resort might be had to the United States court.

V.

THE COMPLAINT STATES A CAUSE OF ACTION FOR INJUNCTIVE RELIEF.

Some contention was made at the time of the argument on the motion to dismiss that the complaint in this case did not state a cause of action because its averments were averments of conclusions of law rather than averments of fact. A comparison of the allegations of this complaint with the allegations contained in the complaint in the case of *Prendergast v. New York Telephone Co.*, 262 U. S. 43, will show that if the averments in this complaint are averments of conclusions of law, the same is equally true of the averments in the complaint in the *Prendergast* case.

This court, however, said of the allegations in the complaint in the *Prendergast* case, that the complaint "aptly stated the ultimate facts upon which the company asked relief omitting any mere statements of evidence."

Conclusion.

It is pointed out in our brief opposing the motion to dismiss the appeal from the order of the statutory court denying an interlocutory injunction, that if that particular appeal is dismissed the question of whether or not the statutory court should have considered our application for an interlocutory injunction on the merits should be considered on this appeal.

In any event, all we seek by these appeals is an opportunity to have the case considered on its merits. So far we have been denied that opportunity, and the denial has been based upon the ground that the legislative process of determining the value of our property is not complete, and that there is a possibility that the state courts of Washington, if applied to, will stay the enforcement of the rate order which deprives us of our property. But the answer to these assertions of fact and possibility is clear and complete. It is not necessary for a utility which is daily suffering confiscation to await the termination of the legislative process of rate making, much less that of the process of determining value, before it may invoke the aid and

power of a United States court. Again, the legislative process was at an end on March 31, 1923, because (a) the statute which attempts to impose a legislative duty upon the state courts of Washington is absolutely void, and (b) the rate order of March 31, 1923, which deprives us of our property has never been reviewed and cannot now be reviewed in the state courts. Moreover, even if that order could now be reviewed its enforcement could not, by virtue of positive and express provisions of the statutes of the State of Washington, be stayed by the courts of that state.

We, therefore, respectfully submit that the order of the statutory court entered on April 30, 1923, and the decree of dismissal signed on January 5, 1924, by the District Judge are erroneous and should be reversed.

Respectfully submitted,

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Appendix.

SECTION 10428 OF REMINGTON'S COMPILED STATUTES, 1922, OF WASHINGTON.

Any complainant or any public service company affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under

review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action.

SECTION 10441 OF REMINGTON'S COMPILED STATUTES, 1922, OF WASHINGTON.

Valuation of Property—Procedure.

The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition the property of every public service company.

It shall also ascertain the amount and present market value of the capital stock and funded indebtedness of every public service company.

It shall also ascertain in the case of companies engaged in interstate business, the relative value of the use to which such property in this state is actually put in the conduct of interstate business and state business respectively.

It shall also ascertain the total market value of the property of each public service company operating in this state used for the public convenience within the state.

It shall also ascertain the time intervening between the expenditure of money in the cost of construction and time when returns in the shape of dividends were first received by each of these companies.

It shall also ascertain the probable earning capacity of each public service company under the rates now charged by such companies and the sum required to meet fixed charges and operating expenses, and in case of a company doing interstate business it shall also ascertain the probable earning capacity of such company upon intrastate business, and the sum required to meet fixed charges and operating

expenses on intrastate business, and the relative proportion of intrastate and interstate business, the relative proportion of the operating expenses connected therewith, the relative proportion of the revenue which should be derived therefrom.

It shall also ascertain the density of traffic and of population tributary to every public service company, and the conditions which will tend to show whether such traffic and population is likely to continue, increase or diminish.

It shall also ascertain the existence of grades, curvatures and other physical conditions affecting the movement of traffic and business of common carriers.

It shall also ascertain whether the expenditures already made by any public service company in procuring its property were such as were justified by the then existing conditions, and such as might reasonably be expected in the immediate future and whether the money expended by such company has been reasonable for the present needs of the company and for such needs as may reasonably be expected in the immediate future.

The commission is hereby authorized to cause a hearing or hearings to be held at such time or times

and place or places as the commission may designate for the purpose of ascertaining the matters and things provided for in this section.

The commission shall, before any hearing is had, notify the company concerned of the time and place of such hearing, by giving at least thirty days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such company's property within the state, which shall be a sufficient complaint to authorize the commission to inquire into the matters designated in this section.

All companies affected shall be entitled to be heard and introduce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission.

The commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it shall tend to show the value of the property used by such company for the public convenience.

Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted or unjust, may institute proceedings in the superior court of the State of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined. Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

Said public service company or the commission shall have the right to appeal from the decision of the superior court to the supreme court of the State of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received.

The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested, whether arising under the provisions of this act

or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, except as a basis for taxation, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined.

The commission shall hereafter, from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions, and extensions made by any public service company to its property subsequent to the date of any prior hearing, and shall examine into all traffic movement and every matter and thing that would change, modify or affect any finding of fact previously made, and shall at such time make findings of fact supplemental to those theretofore made, showing the amount expended in betterments, improvements, extensions and additions since such prior findings and the cost of reproducing the same, the value of the property used by such company at the time of such subsequent hearing, the relative value of the use to which such property is put in the performance of intrastate and interstate business, respectively, and the value of the property of such company in the state used for the public convenience

of intrastate business. Such hearing shall be had upon the same notice, the examination conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing and findings: Provided, that such findings made at such supplemental hearing shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing.

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BRIEF AND ARGUMENT OF APPELLEES

STATEMENT.

The statement of the case has been fairly made in the brief of appellant and we have nothing to add

thereto and no comment thereon, except that in the third paragraph of page 13 of the brief in the Pacific case, the statement is made that the district court granted a motion to dismiss on the ground primarily that the suit had been prematurely brought. We call attention to the order of dismissal which recites that the motion to dismiss is sustained "upon the grounds that the bill of complaint herein does not state any matters of equity entitling the complainant to the relief prayed for; that said bill of complaint does not state facts sufficient to entitle complainant to any relief against the defendants; and that said bill has been prematurely brought by reason of the failure to exhaust the right of plaintiff to relief in the superior and supreme courts of the state of Washington." Arguments were urged and authorities cited by the appellees herein in support of all three grounds referred to and the record does not justify the statement that the bill was dismissed primarily for one ground more than for another.

A few words of explanation are deemed necessary before beginning the formal argument. Upon receipt of news that these four cases had been advanced, we telegraphed the clerk as to whether separate briefs would be required, and were advised that one brief would be sufficient, and we are therefore covering all four cases in the one brief. We have not received a copy of the record in cases numbered 789 and 790, and reference throughout this brief to the transcript are to the transcript in cases numbered

539 and 540 which, we understand, is identical with the transcript in the other cases up to page 164 in the Pacific case and page 132 in the Home case. Inasmuch as the same points of law are involved in both the Pacific and Home cases, it is unnecessary to continually repeat the names of both companies, and throughout this brief we have used the term "appellant" as referring to either or both of the telephone companies, and the term "complaint" refers to either or both complaints unless otherwise specifically noted.

ARGUMENT.

The argument of appellees in this brief will be devoted to a showing that the order of the statutory court dismissing the temporary restraining order and denying a preliminary injunction, and the order of the district court sustaining the motion to dismiss and dismissing the suit, were correct and should be affirmed. For convenient treatment, we have divided the argument into two main divisions: (1) That these actions are prematurely instituted because relief in the state courts was not exhausted; and (2) That the complaint was properly dismissed because of want of equity and insufficient averments of fact.

I.

These Actions Are Prematurely Instituted Because Relief in the State Courts Was Not Exhausted.

(*a*) *Question of Daily Confiscation not Involved.*

Appellants in their brief have contended that where a utility is daily suffering confiscation, it is unnecessary for it to await the determination of the legislative processes of rate making and valuation in the state tribunals before resorting to the federal courts for relief. We wish at the outset to emphasize the fact that no question of daily confiscation is now before this court for consideration. As will be pointed out in detail in the second portion of this

brief, the complaints are not sufficient to make a *prima facie* showing of daily confiscation.

At the time of filing the complaints, the appellants filed certain affidavits setting forth various conditions relative to their business. These affidavits are not referred to in the bills of complaint, nor do the affidavits themselves make any reference to the complaints. If it were not for the caption on the cover of the affidavits and the statement on that cover that they are in support of the bills of complaint, there would be no apparent connection between the complaints and the affidavits. These affidavits are not pleadings in the case and cannot be considered in determining the sufficiency of the complaints. These affidavits were apparently filed as evidence in support of the application for preliminary injunction. The three judges in their opinion concluded with the following statement:

"Reaching this conclusion, the question of the rates, whether fair, reasonable or confiscatory in character, has not been considered." (Tr. No. 539, p. 132; Tr. No. 540, p. 163.)

The statutory court not having considered the merits as to the alleged confiscatory nature of the rate complained of, evidently did not consider these affidavits. Furthermore, the statements in the affidavits are controverted by affidavits of the appellees. In the Pacific case, the affidavit of E. V. Kuykendall (Tr. No. 540, p. 126) was filed, and in the Home case, the affidavits of E. V. Kuykendall (Tr. No. 539, p.

105) and Alex M. Winston (Tr. No. 539, p. 112) were filed by the appellees in support of the motion to dismiss the restraining order and denying the interlocutory injunction.

So far as the question of confiscation could be involved in this appeal, it must be considered on the pleadings and not upon any issue on the merits dependent upon statements in appellants' affidavits contradicted by appellees' affidavits. In such a case, so far as the merits are concerned, this court will follow the rule expressed in the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290; 43 Sup. Ct. 353, and the cases remanded to the district court without an expression of opinion by this court upon the merits of the controversy.

The record before this court on these appeals will not warrant any consideration of the questions of law involved on the assumption that the complaining utility is suffering daily confiscation. If any presumption is to be indulged in by this court, it is in favor of the correctness of the order of the department and the decrees of the lower court.

We also ask this court to bear in mind that the order of the Department is not one which decreased the rates of the appellants, but merely continues in effect war-time rates originally established by the Postmaster General during the period of Federal control.

(*b*) *Washington State Courts Have Legislative Authority in Reviewing the Order of the Department of Public Works Here Complained of.*

Section 10424, Rem. Comp. Stat., reads as follows:

"Whenever any public service company shall file with the commission any schedule, classification, rule or regulation, the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed increase and the reasonableness and justice thereof, and pending such hearing and the decision thereon the commission may suspend the operation of such rate, fare, charge, rental or toll for a period of ninety (90) days from the time the same would otherwise go into effect, and after a full hearing the commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective: *Provided*, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding sixty (60) days.

"At any hearing involving any change in any schedule, classification, rule or regulation the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the burden of proof to show that the changed schedule, classification, rule, or regulation, or the increased or proposed increased rate, fare, charge, rental or toll, is just and reasonable shall be upon the public service company.

"The commission shall give to the hearing and decision of such questions preference over all other questions pending before it and shall decide the same as speedily as possible.

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court."

Section 10441, Rem. Comp. Stat., is set out in full in an appendix to appellants' briefs, and for that reason is not quoted here.

After the Department of Public Works, one of the appellees herein and hereinafter referred to as the Department, suspended for a period of ninety days the proposed rates filed by appellants, it proceeded upon a series of hearings for the purpose of determining whether or not the proposed rates filed by appellants were fair and reasonable. To determine this question it became necessary to ascertain the value of appellants' property, as necessarily the question of valuation is of most vital importance in determining whether a rate is a reasonable one. The only law authorizing the department to value property of public service companies is section 10441, Rem. Comp. Stat., and it is therefore reasonable to presume that the Department, in computing the value of the property belonging to appellants, did so in accordance with law and under the provisions of section 10441, *supra*. At the conclusion of the hearings the Department entered an order denying the proposed rate increase filed by appellants, and among other things, made a finding of fact relative to the

value of appellants' property. (Tr. No. 539, p. 27.) In No. 539 the Department found that the value of the property of the Pacific Telephone & Telegraph company, including the Spokane exchange, was, on June 30, 1922, $32,108,853.76 (Tr. No. 540, p. 41). The Department therefore entered into an investigation and determined the value of appellants' property for the purpose of determining whether the proposed increased rates were reasonable and fair, and made a finding on the question of value in the order denying an increase in rates. Section 10441, *supra,* provides that an appeal may be taken from the order of the Department fixing value, and that the superior court may substitute a different value from the value found by the Department, and the Supreme Court has like power. The appellant in its complaint in the *Pacific* case (Tr. No. 540, p. 5), alleges that the fair and reasonable value of its property in the state, not including Spokane, is $35,616,896.00, and in the *Home* case (Tr. No. 539, p. 4) the corresponding figure for the Spokane exchange is alleged to be $5,710,684.00, making a total alleged fair value of the entire state of $41,327,580.00. The appellants contend that they are entitled to a return of eight per cent on this fair value. It is apparent from the foregoing statute that in so far as the difference between the appellants and the Department rests upon a difference in valuation, the matter could have been determined by the state courts. There can be no

question that the process of fixing value is legislative in its character.

City of Bluefield v. Bluefield Water Works & Improvement Co., 94 S. E. 121.

In the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, on this question the court said:

"Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact."

Inasmuch as appellants did not appeal from the order of the Department denying their increase and making a finding on the valuation and the courts have power to exercise legislative functions on such an appeal, it is apparent that the legislative process under the jurisdiction of the state has not been exhausted on account of the failure of the appellants to take such appeals.

In the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, it appeared that Federal jurisdiction was invoked for the purpose of restraining the Virginia State Corporation Commission from publishing or taking any steps to enforce a certain order fixing passenger rates, on the ground that such rates were confiscatory in their character. The statutes of Virginia provided that appeals might be taken from the order of the Commission to the Virginia courts, which courts exercised legislative functions in determining such appeals, which delegation of power to

the Virginia courts was sanctioned by the Virginia constitution. The contention was made in that case that the railroad company must first exhaust its remedy in the state court before invoking Federal jurisdiction by reason of the fact that the legislative process was not complete, and this contention was upheld by the Supreme Court, wherein it was said (p. 229):

"Our hesitation has been on the narrower question whether the railroads, before they resorted to the Circuit Court, should not have taken the appeal allowed to them by the Virginia constitution at the legislative stage, so as to make it absolutely certain that the officials of the State would try to establish and enforce an unconstitutional rule. Considerations of comity and convenience have led this court ordinarily to decline to interfere by *habeas corpus* where the petitioner had open to him a writ of error to a higher court of a State, in cases where there was no merely logical reason for refusing the writ. The question is whether somewhat similar considerations ought not to have some weight here."

It appears in the case of *Oklahoma Natural Gas Co. v. Russell*, 43 Sup. Ct. Rep. 353, that the plaintiffs are corporations under the laws of Oklahoma and furnish natural gas to consumers at rates established by the corporation commission. They applied to the commission for higher rates, but were denied an advance. The Constitution of Oklahoma was also similar to that of Virginia, construed in the *Prentis* case, *supra*, and gave the courts legislative power in determining appeals from the corporation commission with power to substitute a different order from

the order appealed from. Appeals were taken to the Supreme Court, and a supersedeas was applied for, but refused. After the supersedeas was denied, bills were filed in the District Court to restrain the commission from enforcing them on the grounds that they were confiscatory of the company's property. Objection was made to such bills on the ground that they must wait until the state courts denied the appeals before Federal jurisdiction could be invoked, and the court there held (p. 354):

"Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes, *they are suffering daily from confiscation under the rate to which they now are limited. They have done all that they can under the state law to get relief and cannot get it.* If the Supreme Court of the State hereafter shall change the rate, even *nunc pro tunc*, the plaintiffs will have no adequate remedy for what they may have lost before the Court shall have acted." (Italics ours.)

This case is squarely in point, and holds that where an appeal is provided for by state statute to a state court which can exercise legislative duties on such an appeal, that the service corporation must first ask for a stay in the state court before the Federal courts will assume jurisdiction. In the instant case no application was ever made to the state courts for a stay. For this reason it would seem that the *Oklahoma Natural Gas Co.* case, *supra*, is controlling here, and that the District Court could not assume jurisdiction until an

application for a stay had been made in the state courts as held by the opinion of the three judges in refusing to pass upon an application for a temporary injunction.

The case of *Prendergast v. New York Telephone Co.*, 262 U. S. 43, is in no way in point in this question, as the statutes of the state of New York providing for appeals to the courts from orders of the public service department did not vest the courts with any legislative power in determining such appeals.

The case of *Love v. Atchison T. & S. F. R. Co.*, 185 Fed. 321, which is relied on by appellants, is clearly not in point, because it appears in that case that the constitution of Oklahoma fixed the passenger fare of railroads at two cents per mile. The railroad company sought to enjoin the members of the corporation commission of Oklahoma from enforcing this provision of the constitution. Clearly, the railroad company had no other alternative than to seek Federal jurisdiction, as no appeal would lie in the state courts from an order of the commission enforcing such rate, as shown by the following language (p. 324):

"The records before us present no such case. The passenger fare of two cents per mile was prescribed by section 37 of the Constitution of Oklahoma, which prohibited a higher rate. No escape from this fiat was given by appeal or by supersedeas, and the only intimation of possible relief from it through the rate-making officers of the state government is found in the proviso which the section contains to the effect that the Corporation Commission

shall have the power to exempt any railroad company from the operation of the fare upon satisfactory proof that the company cannot earn a just compensation for its services to the public, unless it is permitted to charge more than two cents per mile for the transportation of passengers within the state. This proviso, however, grants no authority to the Commission to make fares, to fix a reasonable fare, or to determine the reasonableness of any fare fixed. It does not even give the Commission power to exempt a railroad company from the operation of the two-cent fare, unless that fare and all the other fares and rates of the company, taken together, are proved to its satisfaction to be confiscatory, and the exercise of this power is necessarily not a legislative, but a judicial, function. Its exercise requires the determination of the question whether or not section 37 of the Constitution of the state is violative of the fourteenth amendment of the Constitution of the United States, and the jurisdiction to determine that question is granted by the Constitution and the laws of the United States to the federal courts, and no law or act of any state may deprive them of the power or relieve them of the duty to perform this function when those entitled to their decision properly invoke their action. *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. Ed. 546; *General Oil Co. v. Crain*, 209 U. S. 211, 212, 28 Sup. Ct. 475, 52 L. Ed. 754; *Barber Asphalt Paving Co. v. Morris*, 66 C. C. A. 55, 59, 132 Fed. 945, 949, and cases there cited."

(c) *Section 10441, Rem. Comp. Stat. is Constitutional.*

It is contended in appellants' briefs that section 10441, Rem. Comp. Stat., in so far as it attempts to grant legislative authority to the courts, is unconstitutional as violating the provisions of the consti-

tution of the state of Washington which separates the state government into the executive, judicial and legislative departments and prescribes the officers and duties of each. While this is in a sense true, it will be noted that nowhere in the constitution of the state of Washington does it expressly provide that legislative functions may not be performed by judicial officers, or vice versa, as is the case in a majority of the constitutions of the several states, and this separation into the three branches of government is only by implication in the constitution of the state of Washington.

In the case of *Bellingham Improvement Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774, it appeared that the local improvement law of the state of Washington provided that the city council shall enter a decision determining the regularity, validity and correctness of the assessment, and it was urged that such law was unconstitutional in conferring judicial powers upon a legislative body, contrary to section 1, article 4 of the constitution of the state of Washington, which provides, in substance, that the judicial power of the state shall be vested in the supreme court, superior courts, justices of the peace and such inferior courts as the legislature may provide. In holding that the council might exercise such powers, the court said (p. 57):

"It has been common for courts to use expressions to the effect that judicial powers could not be conferred upon bodies other than courts under con-

stitutions with provisions similar to ours; but the term 'judicial powers' has not, by the constitution, been defined, nor do we think it is susceptible of any specific definition. Section 1 of article 4 of the constitution evidently means that the judicial power of the state which is exercised by courts shall be vested in the supreme and superior courts and justices of the peace and such inferior courts as the legislature may provide. It is more in the nature of a declaration of the names of courts than it is of a definition of judicial power; and this article of the constitution must have been enacted with the knowledge that *quasi* judicial powers have from time immemorial been conferred upon administrative bodies and officers, such as assessors, boards of county commissioners, boards of equalization, auditors, and even sheriffs, who frequently have to decide as to the value of property in cases of exemptions and in other respects. Again, there is a distinction, which the courts have observed, between judicial investigation and decisions concerning the relative rights of individuals and the rights of individuals and the public."

Obviously, if judicial powers of this character might be exercised by a legislative body, the converse would also be true, and that acts somewhat legislative in their character might be performed by judicial bodies under the constitution of this state. Illustrating the point that the constitution of this state does not distinctly draw the lines between legislative, executive and judicial power, is the following quotation from the case of *State ex rel. Oregon R. Etc. Co. v. R. R. Com.*, 52 Wash. 17, 100 Pac. 179 (p. 32):

"The contention is also made that the commission act provides for the intermingling of legislative, executive, and judicial power. If we have given the statute proper construction, the concessions made by

counsel for appellant as to the character of the commission laws which it is within the powers of the legislature to enact, renders unnecessary a discussion of this proposition; but yielding the courtesy of discussion, while there is no question that the constitution of the state recognizes a division of the powers of the state into three separate co-ordinate departments, viz., legislative, executive, and judicial, it is well established that the special jurisdiction of each is understood to be applied in a limited sense, and it is not meant that they must be kept wholly and entirely distinct without any connection or dependence whatever or connecting link between them."

Again, in the case of *State ex rel. C. M. Etc. R. Co. v. Public S. Com.*, 94 Wash. 274, 162 Pac. 523, the court said (p. 280):

"We have repeatedly held that the legislature may constitutionally confer on the commission judicial powers as a mediatory tribunal, since the constitutional division of governmental powers into the three separate departments applies only in a limited sense and does not restrict one set of officers to one department exclusively. *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179; *State ex rel. Railroad Commission v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3; *State ex rel. Railroad Commission v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8. It is therefore clear that, before this court can hold that any attempt of the legislature to confer on the commission a given power is void as an unconstitutional delegation of either legislative or judicial power, it must clearly appear that the power in question is purely legislative or judicial, and not merely incidental to some of the administrative powers for the exercise of which the commission was created."

The constitution of the state of Washington does not in express terms say that powers legislative in their character cannot be performed by judicial officers, and this has been the construction of the constitution of the state of Washington placed on it by the supreme court of the state of Washington as evidenced by the cases just quoted, which are binding upon this court.

In the case of *Keller v. Potomac Electric Power Co.*, 43 Sup. Ct. Rep., 445, it appeared that Congress had given legislative powers to the courts of the District of Columbia in appeals from an order of the public utilities commission, and in holding that Congress had such power, the court said (p. 448):

"Can the Congress vest such jurisdiction in the courts of the District of Columbia? By the Constitution (clause 17, section 8, article 1) Congress is given power 'to exercise exclusive legislation in all cases whatsoever, over' the District of Columbia. This means that as to the District Congress possesses, not only the power which belongs to it in respect of territory within a state, but the power of the state as well. In other words, it possesses a dual authority over the District, and may clothe the courts of the District, not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts. *Kendall v. United States*, 12 Pet. 524, 619, 9 L. Ed. 1181. Instances in which congressional enactments have been sustained which conferred powers and placed duties on the courts of the District of an exceptional and advisory character are found in *Butterworth v. Hoe*, 112 U. S. 50, 60, 5 Sup. Ct. 25, 28 L. Ed. 656, *United States v. Duell*, 172 U. S. 576, 19 Sup. Ct. 286, 43 L. Ed. 559, and *Baldwin Co. v. R. S. Howard*

Co., 256 U. S. 35, 41 Sup. Ct. 405, 65 L. Ed. 816. Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state Legislature has in conferring jurisdiction on its courts. In *Prentis v. Atlantic Coast Line, supra,* we held that, when 'a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned.' 211 U. S. 225, 29 Sup. Ct. 67, 69 (53 L. Ed. 150); *Dreyer v. Illinois,* 187 U. S. 71, 83, 84, 23 Sup. Ct. 28, 47 L. Ed. 79.

"It follows that the provisions in the law for a review of the Commission's proceedings by the Supreme Court of the District and for an appeal to the District Court of Appeals are valid."

Again, in the case of *Louis. & Nash. R. R. Co. v. Garrett,* 231 U. S. 298, on page 314, the court said:

"Undoubtedly, a State may permit appeals to its courts from the rate-making orders of its railroad commission and, upon the review of such orders, it may expressly authorize its judicial tribunals to investigate and decide questions which otherwise would not belong to them, or even to act legislatively *(Prentis v. Atlantic Coast Line, supra).* But the guaranties of the Fourteenth Amendment do not entitle the carrier to the exercise by the courts of such extra-judicial authority."

(d) *If Section 10441, Rem. Comp. Stat., is Unconstitutional, It Should Be First So Declared By the Supreme Court of the State of Washington.*

It is claimed by appellants that section 10441, *supra,* is unconstitutional as being in contravention of the form of the provisions of the constitution of

the state of Washington, and not as being in contravention of the Federal Constitution. In this state of facts it is a well recognized rule that Federal courts are very reluctant to pass upon the constitutionality of a state statute as being in violation of the constitution of the state prior to the time that a decision on this question has been rendered by the state court. Furthermore, a decision of the state court on this question is binding upon the Federal courts, but the contrary is not true. If this court should hold this statute unconstitutional, its decision would not be binding on the Supreme Court of the state of Washington, which might subsequently hold such statute constitutional, which would be binding on this court. In *Cook v. Burnquist*, 242 Fed. 321, on page 328, the court said:

"As has been stated here upon the argument by counsel for the defendants, the authorities are almost overwhelming to the effect that a federal court is very loath to declare a state statute contrary to the state Constitution, when that state statute has not received an interpretation at the hands of the Supreme Court of the state. That doctrine has been announced by the Supreme Court of the United States, not only in the case of *Louisville & Nashville Railroad v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229, but also in the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, also in the very recent case of *Pullman Co. v. Knott*, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. 105, and it has also been announced numbers of times by lower courts. So that, unless it is perfectly plain on the face of it that section 3 of chapter 261 of the Statutes of Minnesota of 1917 is a delegation of legis-

lative power, such as is forbidden or not allowed under the state Constitution, this court would hesitate to hold that statute unconstitutional."

Again, in the case of *Hunter v. Pittsburgh,* 207 U. S. 161, on page 176 the court said:

"We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the constitution of the State and the conformity of the enactment of the Assembly to that constitution; those questions are for the consideration of the courts of the State, and their decision of them is final. The Fifth Amendment to the Constitution of the United States is not restrictive of state, but only of national, action."

In speaking on this question in the case of *Michigan Central Railroad v. Powers,* 201 U. S. 245, on page 291, the court said:

"At the same time the Federal courts will be reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals. * * * And this reluctance becomes more imperative when the statute has been before the highest court of the State and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined."

The last quotation is determinative of this question, as the Supreme Court of the state of Washington, in the case of *Everett v. Department of Public Works,* 125 Wash. 341, 215 Pac. 1045, had occasion

to refer to section 10441, *supra*, and passed upon the question presented to it on the assumption that section 10441 was constitutional, although the constitutionality of the statute was not raised nor passed upon.

The following pertinent cases, showing the recognition by the Federal courts of the rule of "comity and convenience" are also called to the court's attention.

In the case of *United States v. Anderson*, 169 Fed. 201, the District Court of Idaho, Central Division, in considering the question of concurrent jurisdiction in a naturalization proceeding, states:

"But assuming that the court cannot decline to entertain the petition, every consideration of comity, if not of judicial courtesy, requires that a conclusion be reached in harmony with that of the state court. Any other policy would be intolerable, resulting in confusion of judicial decision and the consequent bewilderment of suitors, and also engendering antagonisms between the courts. If in this matter this court can to-day set aside the judgment of the state district court, there is no reason why that court may not to-morrow send its process here, directing the vacation of an order of this court in some other naturalization matter, should the government feel aggrieved and apply to it for relief. *With the growing complexity of state and national relations, and in view of the ever-increasing conflict of jurisdiction between the state and the federal courts, it is of the highest importance that in exercising their powers the courts of one class shall proceed with scrupulous regard and due deference to the dignity and rights of the courts of the other class.*" (Italics ours.)

In the case of *Boston and M. R. R. v. Niles*, 218 Fed. 944, a preliminary injunction hearing before the three judges under section 266 of the Judicial Code, the District Court of New Hampshire observes:

"The question as to where a grievance of this kind should first be entertained is more a question of desirability, convenience, and comity than a question of right, and we are not disposed to follow the proposition of the right of way through priority of jurisdiction further than to cite a note, containing authorities, which appears in 22 C. C. A. at page 358. It must be said, however, that aside from the force resulting from priority of jurisdiction is the further consideration that *United States courts are reluctant to deal with state statutes with a view to sustaining or overthrowing them before the state courts have first had an opportunity to do that. The Supreme Court has repeatedly said that.* It is said by Mr. Justice Hughes in *Louis. & Nash. R. R. Co. v. Garrett*, 231 U. S. 298, 305, 34 Sup. Ct. 48, 58 L. Ed. 229. It is said in effect by Mr. Justice Holmes in the *Prentis* case, 211 U. S. 230, 29 Sup. Ct. 67, 53 L. Ed. 150, in which both Chief Justice Fuller and Mr. Justice Harlan, though concurring in the result, dissent from the opinion because it does not go far enough on lines of comity. It has more recently been said in an opinion by Mr. Justice Holmes, handed down November 2, 1914, in *Pullman Co. v. Knott*, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. —. It is true that these cases have reference to statutes which it is claimed offend state Constitutions, but it is not perceived that the reason of its being a state Constitution instead of the federal Constitution was the controlling reason. As has already been said the federal Constitution is a part of the system under which the state courts operate, and it is because the state courts recognize the federal system as a part of their own that *rules of comity require, and particularly in cases first pending before them, that they should first have*

an opportunity to pass upon the statutes of their own state. It is incumbent upon the federal courts, in such a situation as this, to presume that, if the Supreme Court of the United States has declared a statute like the one involved here to be in contravention of the federal Constitution, the Supreme Court of New Hampshire will give the force of such a decision its proper consideration and scope. Such a presumption results in a large measure because of the strong expressions by state courts like those of Mr. Justice Cullen in *Bearsley v. New York, L. E. & W. R. R. Co.*, 162 N. Y. 230, 56 L. Ed. 488, that 'in obedience to the law, as declared by the Supreme Court of the United States, we must hold the statute of 1895 is invalid,' that of the Supreme Court of Appeals of Virginia in the *Coast Line Ry. Co.* case, 106 Va. 61, 67, 55 S. E. 572, 574 (7 L. R. A.—N. S.—1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124), that 'we are bound by this decision, as it emanates from the highest tribunal in the country,' and numerous like expressions which could be cited, if deemed necessary." (Italic ours.)

The District Court for the Northern District of California, Second Division, in the case of *Palermo Land & Water Co. v. Railroad Commission*, 227 Fed. 708, involving a suit to enjoin the railroad commission of California from enforcing a rate order, observes:

"This is rested, not only upon well-settled principles of equity jurisprudence, but upon the dictates of comity as well; that where a state has provided, as is its right, a complete legislative scheme for the fixing of rates, those rights should not be interfered with, nor the proceedings of the state arrested, until the last legislative step has been taken, and it may definitely be seen whether the act of the state as a

finality ignores or infringes upon the rights of the complaining party; that until such time it cannot be said that the state authorities have violated those rights, or refused to observe them, and until that stage is reached it is not within the province of the federal courts to interfere. As aptly and tersely put by the Chief Justice in his concurring opinion:

"'The transaction must be complete, and jurisdiction cannot be rested on hypothesis. A fortiori, this must be so where federal courts are asked to interfere with the legislative, executive or judicial acts of a state, unless some exceptional and imperative necessity is shown to exist, which cannot be asserted here. Moreover, this is demanded by comity, and what comity requires is as much required in courts of justice as in anything else. * * * And as applied to federal interference with state acts, the observance of this rule of comity should be regarded as an obligation. It is recognized as such by section 720 of the Revised Statutes'."

The District Court for the Southern District of Florida in the case of *Jackson v. Cravens*, 235 Fed. 212, another three-judge hearing on a preliminary injunction application, states:

"It will, however, be difficult to cite a case where, on *an application for preliminary injunction*, a court of the United States devoid of original jurisdiction, save for the federal question involved, *will undertake to test the validity or effectiveness of state legislation*, in the light of the state Constitution, or review in any way the discretion of the state Legislature as expressed in the enactment." (Italics ours.)

(e) *The Supreme Court of the State of Washington Has Inherent Power to Suspend an Order of a Lower Tribunal by Virtue of Article IV, Section 4, of the Constitution of the State of Washington.*

Appellants contend that the rule announced in the Oklahoma Natural Gas Co. case, *supra*, is not applicable here because sections 10424 and 10429, Remington's Compiled Statutes, deny them a stay in a proceeding of this character, and that they should not be compelled to do a useless thing and ask for a stay when such stay is denied them by statute. Article IV, section 4, of the constitution of the state of Washington, reads as follows:

"The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state, or any judge thereof."

It is our position that the jurisdiction of the courts of record in the state of Washington is dependent upon the constitution. Certain jurisdiction is given them by the constitution which cannot be abridged by the legislature. While we do not wish to be understood as absolutely taking the position that these statutes just referred to are unconstitutional, yet we do claim that there is sufficient doubt as to their constitutionality to warrant the three-judge court in directing appellants to apply for a stay in the state courts before they would pass on their application for an interlocutory injunction, and that in any event it was incumbent upon appellants to first ask the state courts for such stay.

In the case of *State ex rel. etc. v. Superior Court*, 15 Wash. 668, 47 Pac. 31, the question arose as to the power of the supreme court to issue a writ of prohibition. In holding that the jurisdiction of the supreme court is dependent upon the constitution, the court said (p. 672):

"It thus appears that the jurisdiction of the supreme court and of the superior courts of this state is expressly defined by the constitution, and reference must therefore be had to that instrument in order to determine the question of jurisdiction in any particular case; and it will be observed that by the terms of the constitution both this court and the superior courts are empowered to issue writs of prohibition."

It will be noted that article IV, section 4, of the constitution of the state of Washington, gives the supreme court of the state power to issue writs of

prohibition, and in the case of *Windsor v. Bridges*, 24 Wash. 540, 64 Pac. 780, it was held that the law in force defining the writ of prohibition at the time of the adoption of the constitution, and such law having restricted the writ to its common law function for the restraint of unauthorized judicial power, was the writ mentioned in the constitutional provision and that the original jurisdiction of the supreme court could not be extended by statute to include ministerial and administrative acts. In holding that the jurisdiction of the supreme court is to be determined by the constitution and not by statute, the court said (p. 546):

"The legislature has not the power, however, to create additional remedies under the name of such writs, and confer thereby on this court original jurisdiction for the enforcement of such remedies. The original jurisdiction of this court is fixed by constitutional limitations, and is derived from the constitution, and not in pursuance of any legislative enactment."

In the case of *In re Rainier Avenue*, 80 Wash. 688, 141 Pac. 1137, it appeared that the city had condemned some land and paid the award into court. An appeal was taken, but the city claimed the right to proceed with the improvement notwithstanding the appeal. The property owner then applied for a supersedeas pending the appeal. The city contended that under the statute, the court is without jurisdiction to grant a supersedeas. The statute does provide that no appeal from a judgment entered upon the

award of a jury shall delay proceedings under an ordinance directing public improvement if the city shall pay into court for the owners as directed by the court, the amount of the judgment and costs, and that such city, after making such payment, shall be allowed to enter upon the property condemned and proceed with the improvement. In holding under such circumstances that a supersedeas was proper, the court said (p. 691):

"The merits of the controversy are not now before us, and it will be understood that we express no opinion on the merits of the question suggested. They are mentioned for the purpose of showing that the controversy is real, and that, if they be found meritorious, a constitutional right of the appellant will be violated if the supersedeas is not granted."

In the case of *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, it appeared that the board of school directors were about to discharge the superintendent of schools. The superintendent then applied for a writ of prohibition to prohibit the school directors from proceeding. On the return of said writ, the superior court sustained a demurrer quashing the alternative writ and entering judgment in favor of the defendants. The school superintendent then gave notice of appeal and asked for a supersedeas. Although no statute authorized a supersedeas in a case of this character, the court by virtue of the following language granted one (p. 10):

"Section 4 of article 4 of the constitution of Washington, after reciting the original jurisdiction of the supreme court, says further:

" 'The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.'

"It is conceded that an appeal lies from the judgment of the court in quashing the writ, and, under the provision just read, for the purpose of making that appeal effective, and to insure the complete exercise of this court over that appeal, it becomes necessary and proper to supersede the judgment, otherwise the right to appeal which the statute has given would be of no avail to the appellant, for if the board of directors in the meantime were to proceed to remove him, when the case finally reached this court on appeal it would have to be dismissed for want of merit, because the trial on merit would already have terminated. *People v. Commissioners of Excise*, 61 How. Pr. 514. We think this is exactly the kind of a case which is contemplated by the constitution, and that the only way that this court could maintain the complete exercise of its appellate jurisdiction would be by issuing the writ prayed for. There would be no meaning to the provision of the constitution, and no necessity for it, if it could only be held to apply to cases where supersedeas was provided for by the law."

Again in the case of *Lund v. Idaho & Washington Northern R.*, 48 Wash. 453, 93 Pac. 1071, the court said (p. 455):

"This court has held, that to maintain the existing status and to preserve the fruits of litigation to an appellant, it has, in aid of its appellate jurisdiction and in the exercise of its discretion, authority to grant a supersedeas pending the determination of an appeal, and that it may do so although the appellant is not, as a matter of right, entitled to a supersedeas under any existing statute. *State ex rel.*

Barnard v. Board of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. 706, 40 L. R. A. 317."

To the same effect is that portion of the opinion in *State ex rel. Davis & Co. v. Superior Court,* 95 Wash. 258, 162 Pac. 360, which reads as follows (p. 261):

"This court, in aid of its appellate jurisdiction, or in the exercise of its original jurisdiction, possesses all inherent power of courts of equity, and when it is made to appear that a party is being denied relief to which in equity and good conscience he is entitled, it is the duty of this court to find some method within its jurisdiction by which such relief may be granted."

Again, in the case of *Bier v. Clements,* 95 Wash. 505, 164 Pac. 82, the court said (p. 508):

"However, being of the opinion that appellant is entitled to a stay of the effect of the judgment here appealed from, in so far as it dissolves the temporary restraining order, and it being the settled law of this state that this court may in its discretion so act in aid of its appellate jurisdiction, we need not bother ourselves with the question of appellant's strict legal right under the statute to have the superior court fix the amount of a supersedeas bond to be given by him to the end that he may thereby have such stay as a matter of right without application to this court. Const., art. 4, sec. 4."

The doctrine of these cases seems to be that irrespective of the question of supersedeas, the jurisdiction of the courts of record of this state is defined by the constitution of this state, and that the legislature may not take away any jurisdiction from the courts which the constitution grants them. Under

article IV, section 4, the courts of record are given power to grant all rights necessary to their appellate jurisdiction, which would include the right to suspend an order of a lower tribunal when the litigants applying for such a suspension as a matter of equity were entitled thereto. The courts of this state are clothed with equity powers, and sitting as such have inherent power to suspend an order of a lower tribunal.

(*f*) *Application for a Stay in State Courts a Proper Condition Precedent to Jurisdiction of Federal Courts.*

Some contention is also made by appellants that in any event they are too late to appeal to the courts of the state and therefore there would be no remedy for them in taking such an appeal. Section 10428, Remington's Compiled Statutes, provides that an appeal must be taken within thirty days from the date of service of the order. No such appeal was ever taken and appellants should not now be heard to say that by virtue of their own dilatory actions and failure to take an appeal within the time prescribed by law they are entitled to invoke federal jurisdiction when otherwise they would not be. Also, section 10441, Rem. Comp. Stat., which provides for an appeal to the courts from valuation findings, does not prescribe a time when such appeal must be taken. It will be noted from the opinion of the three judges (Tr. No. 539, p. 119; Tr. No. 540, p. 150) that the

federal court did not refuse to take jurisdiction, but specifically retained jurisdiction and refused to proceed further in the case until appellants had applied to the superior and supreme courts of the state for a stay, and in the event the stays were denied, that the federal court would proceed to pass upon the application for an interlocutory injunction. The statutory court was familiar with local conditions. A hearing was proceeding in an orderly manner under state administration wherein appeals were provided for in the state courts. The three judges were of the opinion from all the facts and circumstances that in view of this situation and by virtue of the broad grounds of comity and convenience the more orderly procedure would be for the federal courts to refuse to pass upon the application for an interlocutory injunction until a stay had been asked for in the state courts. And it is submitted, in view of these facts and the discretion on this matter exercised by the three judges familiar with local conditions, that this court should be very reluctant to overrule the three judges on this question.

The obstacle placed in appellants' way by the three-judge court before it would pass on the application for a temporary injunction was not particularly onerous. All appellants had to do was apply to the state courts for a stay and if the same were denied the three-judge court would pass on their application for a temporary injunction. The application for a stay to the state courts would be much

easier and rapid than the appeal which they elected to take to this court. Appellants allege that they are suffering daily, although this allegation is denied by appellees, and for this reason desire a temporary injunction. If appellants had applied to the state courts for a stay and the stay had been refused, they could have had their hearing on the merits on their application for a temporary injunction disposed of more quickly than by taking an appeal to this court.

Furthermore, we call attention to the practise observed by this court and the federal courts when the question has been raised that the time has expired within which relief may be applied for in the state courts. It will be noted that the federal courts have declined to assume that the proper state tribunal will not afford relief because of the expiration of the statutory time, and statements to that effect from the following cases are submitted:

Prentis v. Atlantic Coast Line, 211 U. S. 210, 232; 53 L. Ed. 150, 161:

"There is yet another difficulty in applying to these cases the comity which it is desirable if possible to apply. The Virginia statute of April 15, 1903, enacted to carry into effect the provision of the constitution, requires, by section 34, certain, if not all, appeals to be taken and perfected within six months from the date of the order. 1 Pollard's Code of Virginia, c. 56a, 714. It may be that when an appeal is taken to the Supreme Court of Appeals this section will be held to apply and the appeal be declared too late. *We express no opinion upon the matter, which is for the state tribunals to decide, but simply notice a possibility.* If the present bills should be

dismissed, and then that possible conclusion reached, injustice might be done. As our decision does not go upon a denial of power to entertain the bills at the present stage but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. *If the appeals are dismissed as brought too late the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismised without prejudice and filed again.*" (Italics ours.)

Palermo Land & Water Co. v. Railway Commission, 227 Fed. 708:

"In this case, however, the Commission has expressly declared at the bar and in its brief its readiness to entertain an application for a rehearing of the present order, notwithstanding the lapse of the usual time given for the purpose, and has intimated its readiness to suspend the effect of the order until such petition can be passed upon. Should such application be made, and relief denied for any reason, plaintiff will then be in a position to seek a judicial review of the order; but the present bill must, for the reasons indicated, be regarded as premature."

Landon v. Court of Industrial Relations, 269 Fed. 411:

"As to the 30-day period provided in the Kansas Statute above cited, it is sufficient to say that the provision in question has been held by the Supreme Court of Kansas not to be a statute of limitation. *Aetna Ins. Co. v. Lewis*, 92 Kan. 1012, 142 Pac. 954. See, also, *Emporia Telephone Co. v. Public Utilities Commission*, 97 Kan. 139, 154 Pac. 262. And even if said provision were in the nature of a statute of limitation, nevertheless a court of equity might still

entertain a suit of this character even after the statutory period. *Emporia* case, *supra*. See, also, *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 232, 29 Sup. Ct. 67, 53 L. Ed. 150."

Air-Way Electric Appliance Corporation v. Archer, 279 Fed. 878:

"The provisions of the Ohio Statute differ in various respects, which need not be detailed, from those of the Virginia Constitution and act under consideration in *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150: but the rule of comity there observed and the mode of procedure there adopted should, as far as practicable, control here. Whether the action of the plaintiff, after it was notified of the assessment made against it, rose to the dignity of a request or demand for a rehearing before the tax commission, and whether that body, if a request for a rehearing yet be made, will conclude that the request is not timely, or, out of a desire to be accurate and just, will grant a rehearing, regardless of the lapse of time, are questions for the commission to decide. In *Palermo Land & Water Co. v. Railroad Commission* (D. C.) 227 Fed. 708, the defendant in open court offered to entertain an application for a rehearing, although the usual time for applying therefor had expired. In the instant case the defendants have stipulated that the plaintiff's present status, during the pendency of this case and until its decision, shall be maintained, and that plaintiff shall not be subject to any penalties, fines, or forfeitures by reason of any default on its part in the payment of the tax charged against it. Being thus amply protected, the court need not at this time trouble itself over the question of injunctive relief or render final decision. Pending an application for review before the tax commission and the disposition of the same, the present bill will be retained to await the result of such proceedings. When the conclusion

reached is properly presented to the court, it will take such final action as it deems proper."

(a) *Decision in Pacific Telephone and Telegraph Company v. Cushman, 292 Fed. 930, Not Controlling in These Appeals.*

Appellants attach great importance to the decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of *Pacific Telephone and Telegraph Company v. Cushman*, 292 Fed. 930, and have cited this case some six times in each brief. We will conclude this main division of our brief with a short discussion of that case.

When the district court declined to pass upon appellees' motion to dismiss in each of these cases for the reasons stated by the three judges in denying the interlocutory injunction, the Pacific Company applied to the Circuit Court of Appeals for a writ of mandamus to compel the district court to hear and dispose of that motion. Section 266 of the Judicial Code provides that an application for a preliminary injunction shall be heard by a special court of three judges. This statutory court has original and exclusive jurisdiction in determining this application, and the statute gives to the supreme court exclusive appellate jurisdiction to review the order of the three judges on such application. Prior to seeking a writ of mandamus from the Circuit Court of Appeals, appellant appealed to this court from the statutory court, and we think it very clear that the Circuit

Court of Appeals had no jurisdiction to review the order of the statutory court or the reasons upon which that court based its order. We think, therefore, that the opinion of the Circuit Court of Appeals in the *Cushman* case, *supra*, is mere dicta. We realize, of course, that even though dicta, the opinion of this learned court has much weight, but we respectfully submit that it is not entitled to as much consideration as the opinion of the statutory court, the court vested with jurisdiction to determine the issues on the application for preliminary injunction.

This was evidently the opinion of the district court in the instant cases, as after the opinion of the Circuit Court of Appeals had been rendered and the peremptory writ of mandamus issued, the district court proceeded to hear and determine appellees' motion to dismiss, and was evidently not convinced by the reasoning of the Circuit Court of Appeals, as the motion was sustained and the complaint dismissed, such dismissal being based in part upon the reasoning of the statutory court as to the premature seeking of relief from the federal court.

We believe that the opinion of the statutory court (Tr. No. 539, p. 119; Tr. No. 540, p. 150) is entitled to greater consideration and should be controlling on the questions involved in these appeals.

II.

Complaint Properly Dismissed Because of Want of Equity and Insufficient Averments of Fact.

(a) *Motion to Dismiss Does Not Admit Conclusions of Law.*

Equity rule No. 29 abolished demurrers and provided that every defense in point of law arising upon the face of the bill shall be made by motion to dismiss or in the answer. Defendants promptly appeared in these two cases and filed motion to dismiss on the grounds that the bill of complaint did not state any matters of equity entitling the complainant to the relief prayed for, and that the bill of complaint did not state facts sufficient to entitle complainant to any relief.

Upon the motion to dismiss, defendant admits only those facts which are well pleaded. Conclusions of law are not admitted.

Pennie v. Reis, 132 U. S. 469; 33 L. Ed. 428;
U. S. v. Ames, 99 U. S. 35; 25 L. Ed. 295;
Portland Railway Light & Power Co. v. Portland, 200 Fed. 890, 892;
Young v. Mercantile Trust Co., 140 Fed. 61;
General Electric Co. v. Westinghouse Electric & Manufacturing Co., 144 Fed. 467.

This motion to dismiss was argued before the district court on December 31, 1922, and was granted by the court and an order entered dismissing the bill of complaint. The various grounds relative to want

of equity and insufficient averment will be considered together at this time under this one general heading.

(*b*) *Insufficient Allegations of Compliance With State Law as to Foreign Corporations.*

The first paragraph of the bill of complaint in the Pacific case alleges (Tr. No. 540, p. 1):

"That it is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business at San Francisco, in said state, and is a citizen of said state. That during all of the times referred to in this bill of complaint it has owned and operated and now owns and operates a telephone and telegraph system and has been and is now engaged in operating and conducting a public telephone and telegraph system in the State of Washington and elsewhere. *That it has complied with all the laws of the State of Washington relating to foreign corporations, has paid its annual license fee last past due, and is duly authorized to do business therein.*" (Italics ours.)

The italicized portion of the foregoing paragraph is purely a conclusion of law. The requirements of foreign corporations in the state of Washington will be found in sections 3852 to 3854, inclusive, Rem. Comp. Stat., 1922. Section 3853 provides in substance that foreign corporations shall file in the office of the secretary of state a certified copy of the articles of incorporation or other papers attested in the manner provided therein, and section 3854 provides that such corporation shall appoint an agent who shall reside at the place in the state where the principal business of the corporation is carried on,

which appointment shall be in writing, containing certain information set forth in detail in the section referred to. Unless appellant has complied with all the provisions of the Washington statutes as to foreign corporations, it has no legal right to do business in this state, and its complaint is defective and demurrable unless it has alleged therein the ultimate facts showing that all of such preliminary acts have been performed.

This question was considered in the case of *Southern Bell Telephone and Telegraph Co. v. Railroad Commission*, 280 Fed. 901, 906. The district court for the southern district of South Carolina in that case laid down the following rule:

"It is set out in the complaint that the complainant is duly and legally qualified to do a telephone business throughout the state of South Carolina. It is also set out in the bill of complaint that the complainant is a foreign corporation doing business in the state of South Carolina and a nonresident of the state of South Carolina. This allegation is insufficient. The state of South Carolina requires that, in order to permit foreign corporations to do business within its limits, they should perform certain stipulated acts, as prescribed in sections 2664, 2665, 2666, and 2667 of the Code of Laws of 1922. Proper pleading would require that it should be alleged that all those preliminary and additional acts had been performed, and not make simply the general allegation that the complainant is legally qualified to do a telephone business, especially in view of the positive provisions of section 2688 of the Code of Laws of 1922, which declares that it shall be unlawful for any foreign corporation to do business or attempt to do

business in the state without having first complied with the requirements of the law."

The South Carolina statutes referred to by that court have been compared with the Washington statutes above referred to, and the various conditions required to be performed by a foreign corporation under the laws of the two states are substantially the same.

It is true that the court in the case just cited went on to add that inasmuch as no exception had been taken to the complaint in this respect it might be assumed that, although the facts are not well pleaded, compliance had been had with the South Carolina statutes. In the instant case, however, the defendants urged this defect in the bill of complaint at the argument before the district court on the motion to dismiss, and the Southern Bell case was particularly called to the court's attention at that time.

Other cases to this same effect, that a complaint is demurrable if a foreign corporation does not plead the ultimate facts showing a compliance with the constitution and laws of the state in which the suit is brought, are:

Valley Lumber Company v. Dreissel, 93 Pac. 765;

Valley Lumber Company v. Nickerson, 93 Pac. 24;

Kiesel v. Bybee, 95 Pac. 20;

Bonham National Bank of Fairburg v. Grimes Placer Mining Company, 111 Pac. 1078;

Consolidated Wagon & Machine Company v. Kent, 132 Pac. 305;

Acorn Brass Manufacturing Company v. Rutenberg, 132 N. Y. S. 600;

Frick Co. v. Pultz, 147 N. Y. S. 732;

Wood & Selich v. Ball, 83 N. E. 21;

Gerrick & Gerrick Co. v. Llewellyn Iron Works, 105 Wash. 98, 177 Pac. 692;

Guin v. New England Mortgage Security Co., 8 So. 388;

Heiliman Brewing Co. v. Peimeisel, 88 N. W. 441;

Aetna Indemnity Co. v. Geo. A. Fuller Co., 73 Atl. 738.

The Home Telephone & Telegraph Company is a Washington corporation, and the foregoing objections are therefore not applicable to the complaint of that company.

(c) *No Allegations as to Compliance With Sections 10371, 10372 and 10376, Rem. Comp. Stat., re Rate Tariffs.*

Section 10371, Rem. Comp. Stat., provides in part as follows:

"All rates, tolls, contracts and charges, rules and regulations of telephone and telegraph companies, for messages, conversations, services rendered and equipment and facilities supplied, whether such message, conversation or service to be performed be over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable and sufficient * * *."

The bill of complaint recites that the appellant filed with the department of public works of the state of Washington a certain proposed schedule of rates for exchange telephone service, copy of which schedule is in the Pacific case (Tr. No. 540, p. 33) exhibit "B" in the Home case (Tr. No. 539, p. 13) attached to the bill of complaint as exhibit "C," and also filed a certain proposed schedule of toll rates in the Pacific case, which is attached to the bill of complaint as exhibit "B" (Tr. No. 540, p. 26). It is further stated that said department held hearings and made findings and conclusions and by its order of March 31, 1923, denied said proposed schedules for increased rates and continued in effect the existing rates. No application was made to the department of public works for a rehearing on its said order, nor was any resort had to the courts of the state of Washington to review the said order, and under the statutes of this state, such order became final and the rates tendered in exhibits "B" and "C" became entirely null and void and of no further effect.

It is apparent, therefore, on the face of the bill, that the appellants have not filed with the department of public works any schedule of rates, either toll or exchange, other than the existing rates set forth in exhibit "A" to the complaint, which were continued in effect by the department's said order. Although the bill of complaint seeks to have said order of the department declared void, the complaint contains no allegation that any fair, just, reasonable

and sufficient rate other than the existing rate has been filed with the commission subsequent to the entry of said order and contains no allegation of a willingness to file such fair, just, reasonable and sufficient rate and comply with the statute referred to.

It is true that subsequent to the filing of the bill of complaint herein, the appellants did file with the department of public works a schedule of rates corresponding to exhibit "F" attached to the bill. This schedule, however, was subsequently abandoned by the appellants and denied by the department, as will be more fully considered later.

Section 10372, Rem. Comp. Stat., provides in part:

"Every telephone and telegraph company shall file with the commission and shall print and keep open to public inspection at such points as the commission may designate, schedules showing the rates, tolls, rentals, contracts and charges of such companies for messages, conversations and services rendered and equipment and facilities supplied for messages and services to be performed within the state between each point upon its line and all other points thereon, and between each point upon its line and all points upon every other similar line operated or controlled by it, and between each point on its line or upon any line leased, operated or controlled by it and all points upon the line of any other similar company, whenever a through service and joint rate shall have been established or ordered between any two such points. If no joint rate covering a through service has been established, the several companies in such through service shall file, print and keep open to public inspection as aforesaid the separately estab-

lished rates, tolls, rentals, contracts and charges applicable for such through service. * * *"

Section 10376, Remington's Compiled Statutes, provides:

"No telephone or telegraph company shall charge, demand, collect or receive different compensation for any service rendered or to be rendered than the charge applicable to such service as specified in its schedule on file and in effect at that time, nor shall any telephone company or telegraph company refund or remit, directly or indirectly, any portion of the rate or charge so specified, nor extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are specified in its schedule filed and in effect at the time, and regularly and uniformly extended to all persons and corporations under like circumstances for like or substantially similar service. * * *"

The federal court has no power to fix rates. Its function in a case of this nature is confined to a determination as to whether or not the rate fixed by the department of public works is confiscatory.

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362; 38 L. ed. 1014;

Interstate Commerce Commission v. Cincinnati, etc., 167 U. S. 479; 42 L. ed. 243;

Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298; 58 L. ed. 229;

City of Toledo v. Toledo Railways & Light Co., 259 Fed. 450;

Monroe Gas, Light & Fuel Co. v. Michigan Public Utility Commission, 292 Fed. 139.

These statutes are proper police measures of the state and do not violate any provision of the federal constitution. It is necessary that the appellants comply with these provisions of the state statutes, and before they are entitled to seek equitable relief from a federal court, the bills of complaint must affirmatively show a compliance with all of the provisions of these sections and a willingness to continue to comply with such state requirements. No such allegation is contained in the complaint and it is evident that unless the appellants are willing to comply with these requirements, the federal court could afford no relief.

(*d*) *Department's Order Presumptively Correct.*

Section 10449, Remington's Compiled Statutes, provides:

"Whenever the commission has issued or promulgated any order or rule, in any writ of review brought by a public service company to determine the reasonableness of such order or rule, the findings of fact made by the commission shall be *prima facie* correct, and the burden shall be upon said public service company to establish the order or rule to be unreasonable or unlawful."

The *prima facie* reasonableness of the orders of this department have been repeatedly recognized by the Washington supreme court.

State ex rel. Great Northern Ry. Co. v. Public Service Commission, 76 Wash. 625, 634; 137 Pac. 132;

Puget Sound Electric R. v. R. R. Commission, 65 Wash. 75, 98; 117 Pac. 739;

State ex rel. Public Service Commission v. Skagit R. etc., Co., 85 Wash. 29, 39; 147 Pac. 885;

State ex rel. G. & M. Auto F. v. Department of Public Works, 124 Wash. 234, 236; 214 Pac. 164;

N. P. Ry. Co. v. Department of Public Works, 125 Wash. 584, 593; 218 Pac. 507.

Furthermore, this court and the lower federal courts have also repeatedly recognized the *prima facie* reasonableness of the orders of the state commission and the burden thereby imposed upon the complainant.

R. R. Commission v. Cumberland Tel. & Tel. Co., 212 U. S. 414, 421, 423; 53 L. ed, 577, 581;

Darnell v. Edwards, 244 U. S. 564, 569; 61 L. ed. 1317;

Minneapolis & St. Louis R. Co. v. Minneapolis ex rel. R. R. & W. Commission, 186 U. S. 257, 264; 46 L. ed. 1151, 1156;

S. P. Co. v. R. R. Commission, 193 Fed. 699, 703;

Tex. & P. Ry. Co. v. R. R. Commission, 192 Fed. 280, 284;

Louisville & N. R. Company v. R. R. Commission, 208 Fed. 35, 40;

Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission, 283 Fed. 215, 217.

(e) *Allegations of Complaints Insufficient to Overcome Prima Facie Correctness of Department's Order.*

A great many more cases to the same effect might be cited. We are stressing the attitude of the federal courts toward the *prima facie* correctness of the order of the state department for the reason that the appellants have set forth the order of the department in full as exhibit "D," in the Pacific case (Tr. No. 540, p. 38), and exhibits "C" and "D" in the Home case (Tr. No. 539, pp. 17, 24), attached to and made a part of the bills of complaint. When the *prima facie* reasonableness of these orders is taken into consideration, it is, we think, plainly apparent that it becomes the duty of the appellants to plead facts in the complaints in such detail that, if true as they are confessed to be on a demurrer, they will overcome the *prima facie* correctness of the department's findings. A most casual inspection of the order of the department in the instant case and the complaints will show that no such facts have been pleaded. For instance, in the matter of the rate base, the first paragraph of the department's order finds that the value of the telephone properties in the state of Washington, including the Spokane exchange, used and useful in public service on June 30, 1922, was $32,108,853.76. In paragraph V of the findings (Tr. No. 539, p. 38, No. 540, p. 51) an estimate is made of the revenue for the year 1923 under the present rates and the proposed rates. In esti-

mating the return for that year, a rate base was used by the department of $34,789,635. This rate base would correspond to the figures alleged in the complaint as of December 31, 1922. The complaint in the Pacific case alleges that the cost of the complainant's property in the state of Washington, exclusive of Spokane, used or useful in furnishing telephone and telegraph service to the public therein as of December 31, 1922, is $29,347,254 (Tr. No. 540, p. 4). The corresponding figure in the Home complaint for the Spokane exchange is $4,266,899 (Tr. No. 539, p. 3), a total of $33,614,153. It will be noted that the value used as a rate base in the department's findings for 1923 is $1,175,482 in excess of this cost figure pleaded by the complainants. The complainants allege that they are entitled to a net return of eight per cent on what they term the fair value of the property which for the Pacific Company in the state of Washington is alleged to be $35,616,896 (Tr. No. 540, p. 5), and for the Home property $5,710,684 (Tr. No. 539, p. 4), a total for the combined properties of $41,327,580, which is $6,537,945 in excess of the rate base used by the department for 1923. No information is given in the complaint as to the items that make up this fair value over and above the rate base adopted by the department, and it would seem to us plainly incumbent upon the complainant to give the court and the defendants this information.

A reading of the department's order will disclose that two of the principal items upon which the

department and the appellants differ are depreciation and four and one-half per cent contract. Both of these are discussed at length in the department's findings but no reference whatever is made to them in the complaints. The complaints make no direct allegation of the net revenue, expressed in dollars. This revenue is alleged in a roundabout way as being a certain percentage of the cost, and a certain percentage of the fair value. It is also set forth in an equally indirect way by stating that the net revenue was less by a certain amount than the net revenue would have been had they been permitted to earn eight per cent on the cost. We do not believe this is a proper way to plead the net revenues, and some arithmetical computations based upon the figures set forth in the complaint will show that even those figures have been carelessly computed. Thus, for instance, in the Pacific case, it is alleged that in the year 1922 the company's net revenues for the state were 3.17 per cent of the cost. Three and 17-100 per cent of $29,347,254 is $930,307.95. It is further alleged that the net revenues in the state for the year 1922 were 2.58 per cent of the fair value. That percentage of $35,616,896 is $918,915.92, a figure less by $11,392.03 than the 3.17 per cent of the cost. As the net revenue is a fixed figure and was known at the time of drawing the complaint, there is no excuse for a difference of this amount. The corresponding differences for the Seattle exchange are $5,035.49; Tacoma exchange $226.29; and Spokane exchange $790.20.

It is alleged that the difference in net revenue between eight per cent of the cost and 3.17 per cent of the cost in the state for the year 1922 is $1,310,651. The actual difference between those percentages of the pleaded cost is $1,417,472.37, or a difference between the figures pleaded and the figures computed of $106,821.37, a fairly substantial figure. The corresponding differences for the Seattle exchange are $136,945.35; Tacoma, $3,217.29; and Spokane, $2,296.88. No figure for depreciation or depreciation reserve is pleaded whatever, except that one may be obtained by subtracting the alleged cost of reproduction less depreciation from the alleged cost of reproduction. We respectfully urge upon this court that this method of pleading these important figures is entirely insufficient to overcome the *prima facie* correctness of the department's findings, and that such a complaint is not good when challenged by demurrer at the beginning of the action.

While we believe that the department's order is *prima facie* correct and should be so regarded by this court in considering these appeals, we wish to call the following authorities to the court's attention as tending to show that if the department's order be erroneous at all, it is in being too liberal rather than too severe on the appellants.

There should not have been included in the rate base established by the department, and there should be deducted therefrom as a matter of law, the following items:

1. Construction work in progress. (Tr. No. 530, pp. 22, 28; Tr. No. 540, p. 42.)

In re San Joaqin L. & P. Corp, P. U. R. 1920D, 940;

In re W. Va. Water & Elec. Co., P. U. R. 1920D, 409;

Hoffman v. Elmira W. L. & R. Co., P. U. R. 1921C, 409;

In re Wisconsin Tel. Co., P. U. R. 1922B, 553;

In re Southside Water Works Co., P. U. R. 1920D, 752;

Re Two States Tel. Co., P. U. R. 1921B, 405;

King Co. Lighting Co. v. Nixon, (Dist. Ct.) 268 Fed. 143;

Bluefield Water Works & Imp. Co. v. Pub. Serv. Com., 110 S. E. 205.

2. Amounts due from subscribers and agents. (Tr. No. 539, pp. 22, 28; Tr. No. 540, p. 42.)

3. Accrued depreciation reserve. (Tr. No. 539, pp. 23, 30; Tr. No. 540, p. 43.)

Railroad Com. v. Cumberland Tel. & Tel. Co., 53 L. ed. 577, 582;

In re Cumberland T. & T. Co., P. U. R. 1922E, 86, 101;

Meridian v. M. S. L. Co., P. U. R. 1921B, 611, 616;

Re Consumers Co., P. U. R. 1923A, 418, 430;

Missouri ex rel. S. W. Bell Tel. Co. v. Pub. Serv. Com., 262 U. S. 276; 43 Sup. Ct. 544.

City of Cincinnati v. Pub. Utilities Com., 137 N. E. 36, 43 (Ohio).

4. The Pacific case involves a consideration of the new machine switching project installed in the city of Seattle. The department's order devotes considerable space to a discussion as to the treatment accorded this project. (Tr. No. 540, p. 40.) The appellant's forecast that its property in the Pacific case will be confiscated by existing rates is based on the theory of past operating expenses, although such expenses have not been pleaded, and a rate base which includes a machine switching system subsequently to be placed in operation, although the costs of such system have not been pleaded. The department found that this machine switching system would greatly reduce expenses of operation when put in service. This finding is not denied in the bill and is *prima facie* correct. If the machine switching project will not reduce expenses, it should be deducted from the rate base as an injudicious investment, as it is not contended in the bill (or by anyone) that doing one's own telephone operator work is an advantage to the subscriber.

(*f*) *Complaint Fails to Segregate Interstate and Intrastate and Toll and Exchange Business and Contains No Facts as to Revenue and Expenditures.*

In addition to the failure to sustain the burden of pleading sufficient facts to overcome the *prima facie* correctness of the department's order, we wish to call attention to the failure to in any way segregate

intrastate and interstate values, revenues and expenses, and similar failure to segregate toll and exchange figures, and the failure to allege any figures whatever as to revenues and expenses. The failure to make such allegations in the complaint has been repeatedly held fatal to the sufficiency of the complaint, and for convenience of treatment, we will first point out the deficiencies in the complaint in that respect, and then collect in one group a number of cases relative to such matters.

The bill of complaint in the first paragraph of the Pacific case (Tr. No. 540, p. 1), alleges that the appellant is now engaged in operating and conducting a public telephone and telegraph system in the state of Washington and elsewhere, and a similar allegation is made with reference to conducting a telephone exchange in Spokane and vicinity in the Home complaint (Tr. No. 539, p. 1). In the 10th paragraph of the Pacific complaint (Tr. No. 540, p. 4), and the 8th paragraph of the Home complaint (Tr. No. 539, p. 3), it is alleged that the cost to the appellant of its property now being used or useful in furnishing telephone service to the public therein is a certain amount. Neither of these paragraphs allege that the complaint relates to intrastate business only, and we think the court can take judicial notice of the fact that the telephone exchanges of the company throughout the state and in the cities of Seattle, Tacoma and Spokane are used for both intrastate and interstate business. This being so, it

is incumbent upon the company to plead the proportions or amounts of its property devoted to interstate and intrastate, and the revenues and expenses of the two branches of service. It might very well be true that the revenues or expenses of the interstate service were too high or too low, and the proportionate amount of such interstate service might be so great as to have a very material bearing upon the revenues and expenses in the intrastate service. The relation between these two branches of service is pointed out by this court in the case of *Smyth v. Ames*, 169 U. S. 466, 541; 42 L. ed. 819, 847:

"The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business."

And in the case of *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission*, 283 Fed. 215, 218, the district court for the eastern district of Louisiana stated that,

"In considering intrastate rates, the value of property used in intrastate business should be considered separately and not in connection with the value of property used in interstate business," citing the Minnesota Rate Cases, 230 U. S. 352; 57 L. ed. 1511.

No distribution is made as to values, revenues, and expenses between toll service and exchange service. It seems to us that the distinction between these two kinds of service is closely analagous to the distinction between freight and passenger service in railroad cases. In the Pacific case, increased rates are asked for on both exchange business and toll business, but in the Home case, exchange rates only are involved. It may well be that the existing rates as to either exchange or toll may be too low or too high, and that would have a corresponding effect upon the rates for the other kind of service. The court and the defendants are entitled to have before them definitely pleaded information as to the relation between these two kinds of service.

We have heretofore commented on the method of pleading net revenues. No allegations whatever are made as to gross revenues, and the only reference to expenses is that contained in paragraph X of the Home complaint (Tr. No. 539, p. 4), and paragraph XII of the Pacific complaint (Tr. No. 540, p. 5), to the effect that the appellant's business has been conducted efficiently and economically. This is wholly a conclusion of law not admitted by the demurrer and entirely valueless when unsupported by any pleaded facts as to the expenses.

(*g*) *Cases Cited in Support of Sections* (*e*) *and* (*f*).

In support of the objections urged against the sufficiency of the bill in the preceding paragraphs,

we call the court's attention to the following well considered cases:

Southwestern Tel. & Tel. Co. v. City of Dallas, 131 S. W. 80, 85. In this case the Court of Civil Appeals of Texas considered an appeal from the district court denying an application for an injunction against the enforcement of an ordinance of the city of Dallas. The court affirmed the order of the lower court sustaining the defendant's exceptions to the complaint, and with reference to the pleadings of fact stated:

"Before a complainant be allowed to attack a just and valid law, he should be prepared and willing to disclose to the court the most clear and exact detail of facts on which he relies. It is not enough that he gives his estimate of results. His statement should be both ingenuous and convincing. The allegations in plaintiff's petition are conclusions, rather than clearly stated facts. When it is alleged that this reduction of its earnings by reason of the 10 per cent discount will amount to $42,873.60 per annum 'upon the basis of its present number of subscribers,' it would appear that the gross earnings per annum will amount to $428,736 of an investment of $1,000,000. The court has a right to know for itself how these earnings are expended, what part is paid for labor or salaries, and what portion may cover interest on money borrowed or to be used for repairs, and how much is paid out for dividends or betterments. The court would also have the right to know the character and cost of the properties of appellant in detail and determine for itself their reasonable values."

In the case of *Oregon R. & Nav. Co. v. Campbell,* 173 Fed. 957, 991, the district court of Oregon sustained a demurrer and denied an injunction in a suit

to enjoin the Oregon State Board of Railroad Commissioners from putting a certain schedule of rates into effect. With reference to the sufficiency of the complaint, the court observes:

"But the fault with the bill is that no facts are stated as to the cost of the service, or in any way indicating what it is worth to transport freight over the lines of the complainant between the points designated, and the court is, therefore, unable to say from the bill that the rate fixed by the commission is unreasonably low. Especially are these and similar averments insufficient, when read in view of the particular theory upon which the suit is instituted.

"Based upon the foregoing considerations, the demurrer to the bill should be sustained, and the preliminary restraining order should, consequently, be dissolved.

"It is proper to say further, however, that I have carefully examined the affidavits and showing made for a continuance of the injunction, and I am of the firm opinion that the proofs are wholly insufficient to overcome the *prima facie* case that attends the order of the commission, supported by the ample showing of the defendants."

The complainants amended their complaint, and demurrer to the amended complaint was again sustained by the same court in *Oregon R. & Nav. Co. v. Campbell,* 177 Fed. 318. The order sustaining the demurrer to the amended complaint was carried on appeal to this court and affirmed in *Oregon R. & Nav. Co. v. Campbell,* 230 U. S. 525; 57 L. Ed. 1604.

In the case of *Missouri K. & T. Co. v. Love,* 177 Fed. 493, the Circuit Court for the western district of Oklahoma granted a temporary injunction, but

the following observations relative to the necessary pleadings with regard to state and interstate and freight and passenger traffic are applicable in the instant case (p. 497):

"When the railroad within the state is used in both interstate and local commerce it is necessary next to determine what part of its value should fairly be considered as devoted to each use separately, because obviously the company should not exact such excessive rates for local traffic as will also produce a return upon a value employed in a business over which the state has no control. Neither class of traffic, interstate or local, should be made to bear a burden caused by paring the rates on the other to the quick. It is generally agreed that, given the entire value of the railroad property in the state, it is fair to apportion it among the different kinds or classes of business upon a revenue basis, that is to say, in proportion to the gross revenue produced by them respectively. And a like rule applies when the questions involved require separate consideration of the freight and passenger business. In this way will be found the fair proportion of value devoted to each particular use, upon which the owner is entitled for such use to a reasonable return. * * * In these cases, therefore, the total value of the railroad property in Oklahoma of each complaining company, viewed in all its aspects, should be apportioned according to the rule mentioned, and assigned separately to interstate and local business, to freight and passenger business, and to mail, express and miscellaneous business, so the effect of the contested rates may be ascertained."

In the case of *Southern Pacific Company v. Campbell*, 189 Fed. 182, the circuit court for the district of Oregon sustained a demurrer to a bill to enjoin the enforcement of a rate order of the state rail-

road commission. With reference to the facts alleged in the complaint, the court observed at p. 187:

"Again, the complainant does not state the amount of intrastate traffic which will be affected by the order, nor the cost of service, nor the value of the property devoted to such business. It sets out the value of the entire property, the gross receipts and disbursements for both state and interstate business for a number of years prior to the date of the order, the amounts received from state and interstate business, freight and passenger, during the year 1909, and approximate percentage of tonnage affected by the order sought to be enjoined, assuming, as I take it, that both local and interstate traffic are affected by such order. *There is no allegation as to the cost of conducting state business as distinguished from interstate business, and no statement of the difference between passenger and freight expenses.*

"The demurrer should be sustained, and it is so ordered." (Italics ours.)

This case was also appealed to the supreme court (see *Southern Pac. Co. v. Campbell,* 230 U. S. 537, 57 L. Ed. 1610), and the lower court was affirmed. With reference to the sufficiency of the complaint, Justice Hughes remarks at p. 549:

"The order, as already noted, was made in September, 1910, and the bill was brought in October, 1910, but the *receipts and disbursements* for the fiscal year ending June 30, 1910, were not given. In addition to this omission, *the bill was destitute of any allegation showing the expenses incurred in the conduct of the intrastate business as distinguished from the interstate business,* or the *share of the value of the property which was assignable to the former. In short, the allegations of the bill were wholly insufficient to show that the complainants would be de-*

prived of just compensation in their business of intrastate transportation by virtue of the operation of the order.

"In sustaining the demurrer, the court gave to the complainants thirty days in which to plead further; and they thus had opportunity for amending their bill so as to present additional averments which would correct deficiencies in the original allegations and remove any possible misapprehension as to the facts intended to be set forth. But the complainants informed the court that they did not desire to avail themselves of this opportunity and accordingly the bill was dismissed. We think that it cannot be said that any error was committed in thus disposing of the contention as to confiscation." (Italics ours.)

In the case of *Southern Pacific Co. v. Railroad Commission,* 193 Fed. 699, the district court for the northern district of California, southern division, dismissed a bill against the Railroad Commission of California to enjoin the enforcement of certain rate orders. With reference to the insufficiency of the facts pleaded in the complaint, the court states at p. 704:

"When these principles are applied to the present bill, I think it is at once apparent that it fails to put the court in possession of substantive facts sufficient to enable it to sustain the view that the rates are confiscatory. It consists too largely of matters of mere opinion, and general conclusions, more in the nature of assertions or predictions of the effect the rates will have than ultimate facts from which such effect may be deduced. Of course, the general averment that the rates are unjust and unreasonable, if left unsupported by the facts, is not sufficient to impress them with that character. That is a con-

clusion which is not, as we have seen, admitted by the demurrer. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 401, 14 Sup. Ct. 1047, 38 L. Ed. 1014. There must be something more specific than that. While the total present value of the road affected is alleged, no statement is made to show what part of this total value is assignable to state traffic as distinguished from interstate business, nor what proportion of such value is properly to be assigned to the particular traffic affected by the rates fixed as distinguished from other traffic. Nor is any attempt made to segregate the values properly assignable to passenger traffic as distinguished from freight traffic. The same defects are apparent in the statement of operating expenses and charges. The gross operating expenses for one year are given, but no facts are alleged to show what proportion of these expenses are chargeable to state business as distinguished from interstate business; how much to local freight traffic as distinguished from local passenger traffic; nor how much to the particular traffic affected by the order in question. It is alleged that the 'known loss on said branch by reason of the order of the defendant will be $112,439.63,' but there are no sufficient facts to show how this result is to be arrived at. Elsewhere it is averred that complainant's principal business between the points affected consists of interstate commerce, and that it will be compelled to 'lower all its interstate rates upon freight, merchandise and commodities moving between said cities of San Pedro and Los Angeles, and reduce said rates conformable to those assumed to be charged by said defendant;' but there is no averment as to what portion of the predicted loss will be on the traffic affected by the order as distinguished from the general body of traffic. These omissions leave the further averment in the bill that the enforcement of the order will reduce complainant's income on the investment affected to but 2.22 per cent., standing as a mere conclusion unsupported by the facts alleged."

In the case of *Atlantic Coast Line R. Co. v. Interstate Commerce Commission,* 194 Fed. 449, the commerce court sustained the special demurrer in part, and in so doing states its reasons at p. 454, in the following language:

"We think the demurrer in some of its specifications as to the paragraphs mentioned must be sustained. In determining this question, we must remember that the petitioners are asking this court to enjoin and suspend an order of the commission fixing rates for the future, in the making of which the commission exercises a legislative function. The importance of the judgment we are asked to render in the matter must not be overlooked. Before we may annul the order, we must be clearly satisfied it is our duty to do so. *In view of the character of the order and the importance of our action in reference thereto, we believe that this court is entitled to, and must require of the petitioners, a full and fair statement of all the facts upon which they rely for relief.* It is only in rare instances that conclusions of fact or law may be rightly pleaded. The court ought to be permitted so far as possible to draw its own conclusions from the facts stated by the pleader. * * * We do not say that in cases where cost of service cannot be shown a violation of the fifth amendment may not be made out in other ways, but, when petitioners undertake to plead the items of revenue, cost of service, and profit, we are entitled to more information concerning them than is contained in the bill in this case. *Whatever information exists bearing upon the contentions of petitioners is largely in their possession, and in cases of this kind no material information should be withheld, consistent with the rules of good pleading.* We are sustained in these views by the decisions of *L. & N. Ry. Co v. Siler* (C. C.) 186 Fed. 190, and *Southern Pacific Co. v. Campbell* (C. C.) 189 Fed. 182." (Italics ours.)

In the case of *Northern Pacific Ry. Co. v. Lee*, 199 Fed. 621, the district court for the western district of Washington, southern division, being the same court in which the instant case was started, sustained the demurrers to a bill brought to enjoin enforcement of certain orders of the Public Service Commission of Washington. The insufficient allegations of the bill are thus pointed out by Judge Cushman at p. 631:

"The tabulation of values, revenues, and expenses in both bills of complaint fail to disclose the net revenue derived in the past under the old rates from the classes of freight included in the Commission's order. They do not disclose the amount of expenses properly chargeable to those classes; nor set out any estimate of what the revenue and expense would be on the same under the Commission's order. They do not disclose what, if any, net revenue has been realized from the intrastate freight rates not affected by the order, nor whether the same were carried at a profit or loss.

"The Great Northern bill does not show the expenses properly chargeable to intrastate freight, alleging that the expenses cannot be ascertained with mathematical certainty. The presumption upon demurrer would, therefore, be that freight, other than in those classes affected by the order, was not carried at a profit. There must be some point beyond which a carrier cannot go in discriminating in freight charges against various classes of freight, else one class may be compelled to bear the expense of the whole traffic.

"Without deciding the question finally upon these demurrers, it is held that it is not sufficient to justify the revenue received on the freight rates as a whole, but that the facts should be given justifying the rates, as a whole, changed by the Commission;

that this cannot be done without a segregation of those classes and rates from the others."

In the case of *Portland Railway Light & Power Co. v. City of Portland*, 200 Fed. 890, the district court for the district of Oregon denied an application for a preliminary injunction in a suit to restrain the city officials from enforcing an ordinance prescribing maximum rates for gas and electric light companies. The court commented on the insufficient allegations of the complaint at p. 892 as follows:

"There are no facts stated in the complaint showing that the rate complained of is confiscatory, or that, if enforced, it will deprive the complainant of its property without just compensation, nor is there even a general allegation to that effect. The averments are, in substance, that the cost to complainant of maintaining generating capacity for, and service connections with, each consumer exceeds the sum of 50 cents per month, and that a reasonable charge therefor is $1 per month; that the minimum rate prescribed by the city, if enforced, will reduce the revenue of the complainant by 'sums aggregating many thousand of dollars per month, and to an amount less than the actual cost of furnishing the service,' and will deprive the complainant of the right to receive from each consumer the cost of supplying the same to him. These matters might be important, if addressed to a rate-making tribunal; but the court has no authority to fix rates, nor should it attempt to assume such a power and set aside rates fixed by a legislative body, because it might, upon investigation, come to a different conclusion as to the reasonableness thereof. In a case of this character, the court can review the action of the rate-making body only so far as to determine whether or not, under the rate prescribed and the other rates which

the complainant may lawfully charge, it will be unable to realize a fair and just return on the value of its property devoted to the particular public use, and will amount to a taking of its property without just compensation. *Willcox v. Cons. Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; *Lincoln G. & E. Co. v. Lincoln* (C. C.) 182 Fed. 926."

The case of *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission*, 283 Fed. 215, was cited above on a question of failure to segregate interstate and intrastate business and we now quote further from that case as to both the interstate and intrastate, and exchange and toll business, from p. 218 as follows:

"The commission contends that there should be other large deductions from the capital invested and from the operating costs; but it is not considered necessary to pass upon these contentions of the commission, for the reason that the case as made by the plaintiff does not, in our opinion, sustain a right to the relief sought. *There is no separation of values, revenues, cost of operation, or earnings, either as between interstate and intrastate business, or as between intrastate exchange and toll business.*

"The plaintiff was put upon notice by the order of April 1, 1921, by which the question of the reasonableness of its rates was reopened for further investigation, that the rates might be reduced again, and that the order of February 26, 1921, was temporary in its nature. The burden, therefore, remained upon the plaintiff, as the moving party, to separate, not only its interstate from its intrastate telephone business, but also its intrastate exchange business from its intrastate toll business, *and to show by facts, and not by estimates*, that the rates attacked were not sufficient to enable it to earn a fair return upon the

value of its intrastate exchange business. Before the rates authorized by rate-making bodies are interfered with by the courts, the evidence ought to be clear and convincing that the rates attacked are inadequate." (Italics ours.)

(*h*) *Prendergast Case Not Applicable.*

Many of the matters discussed in the three preceding paragraphs were called to the attention of the district court at the time of the hearing on the motion to dismiss on December 31, 1923, and no doubt influenced the court in holding that the complaint was insufficient for want of equity and lack of necessary averments of facts. In answer to these arguments, counsel for the appellants stated that the bills of complaint in the instant cases were copied so far as possible from the bill of complaint in the New York Telephone Company case referred to by this court in the case of *Prendergast v. New York Telephone Company*, 262 U. S. 43, and counsel stated that that complaint had been held sufficient by this court in the case referred to, and must, therefore, be considered as a sufficient and valid complaint by the district court in the instant cases. We wish at this time to call the court's attention to the *Prendergast* case, and point out the reasons why in our opinion it is not applicable to the bills of complaint now before this court. This court, in the *Prendergast* case in commenting on the sufficiency of the bill of complaint then before it, stated at p. 47:

"The defendants answered the bill on the merits without questioning in any way the sufficiency or

form of its averments. See *Campbell v. U. S.*, 224 U. S. 99, 106."

In the *Campbell* case, this court held that the objection to the sufficiency of an answer could not be raised for the first time in an appellate court. The court stated at p. 106:

"But of this it is enough to say that no such objection was made in the district court, but, on the contrary, the answer was treated as sufficient in that respect. This being so, the plaintiff was not at liberty to raise the objection in an appellate court. Had it been made seasonably, it could and doubtless would have been avoided by an amendment."

If the court in the *Prendergast* case had stopped with the citation of the *Campbell* case it would have fully disposed of the question before it relative to the sufficiency of the complaint, and any further comments relative to the complaint are dicta and the question then becomes one as to whether by such dicta the court has intended to put the stamp of its approval upon pleadings of the character we have pointed out. It is to be remembered in the instant cases that the appellees have at all stages challenged the sufficiency of the bills, and that the appellants have not requested leave to amend, but have elected to stand on the sufficiency of their complaints as filed. Furthermore, in the *Prendergast* case a hearing on the merits on the application for the preliminary injunction had been held before the three judges, and the preliminary injunction had been granted. Defects in the complaint were not only

waived by the answer, but were no doubt to a considerable extent cured by the evidence introduced before the three judges. Under conditions such as existed in the *Prendergast* case at the time it was considered by this court, it was possible to accept the complaint as sufficient and not inquire too closely into the nature of the allegations contained therein, but we earnestly ask this court at the present time to examine carefully the allegations contained in these bills, bearing in mind that their sufficiency has at all times been challenged, and that the bill has not been answered, and that no evidence has been taken in support of the bill, and that the order of the Department is *prima facie* correct. We are confident that when so tested, the bills of complaint will be found fatally defective, and that they are not within the conditions set forth in the *Prendergast* case.

Incidentally, we might say further that in the dicta in the *Prendergast* case on p. 47, the court states that the bill alleged, among other things, the cost of the company's property in the state devoted to the rendition of *intrastate* telephone service. We do not have a copy of the bill in the *Prendergast* case, and therefore do not know what distinction that bill showed as between intrastate and interstate, but we have endeavored to point out in a preceding paragraph that the allegation in the bills in this case is not an allegation of the value of its property devoted to intrastate service, and that to that extent at least it may vary from the bill in the *Prendergast* case.

If the dicta in the Prendergast case are held binding in the instant cases notwithstanding the challenging of the complaints by the defendants herein, it seems to us that the inevitable result is either to reject and cast into a discard the numerous well considered cases cited above under which railroad companies have been required to plead facts in considerable detail or else the telephone companies are to be relieved of the burden of pleading facts in the manner required of other utilities. We cannot believe this court will establish a rule in pleading which would so discriminate in favor of one class of utilities as against other classes.

(*i*) *Complaint Subject to Dismissal by Reason of Litigation Becoming a Moot Controversy.*

Furthermore, the complaint was subject to dismissal because the litigation had become a moot controversy. At the time the complaint was filed in the district court in April, 1923, although the district court was asked to place schedule "F" in effect temporarily, no such schedule of rates had ever been filed by the appellants with the Washington department of public works. The appellants apparently realized this discrepancy and rushed to Olympia and filed a schedule of rates conforming to the said schedule "F" just prior to the hearing on the application for an interlocutory injunction. The department of public works suspended the operation of this new schedule for the full statutory period, and

at the end of that period entered an order denying the application for the said schedule "F". Immediately prior to the date which the department had set for hearing on this schedule "F", the company under date of October 19, 1923, submitted to the department of public works, through its attorney, Otto B. Rupp, a statement which, as we are unable to refer to the page of the transcript, we set forth in full as follows:

"On October 16, 1923, there was served on the agent of the company at Olympia, Washington, a 'Notice of hearing re Tariffs covered by our suspension orders dated May 25, 1923, and August 18, 1923, increasing telephone rates particularly in Seattle, Tacoma and Spokane, at Olympia on October 24, 1923, at the hour of ten A. M.'

"Your Honorable Body will recall that on April 24, 1923, the Pacific Telephone and Telegraph Company brought a suit in the United States District Court for the Western District of Washington, Southern Division, in which it sought, among other things, to enjoin the enforcement of an order made by your Honorable Body on March 31, 1923, and that on April 24, 1923, that court issued an order in which, among other things, it restrained your Honorable Body, the Attorney General of the State of Washington and all other persons from interfering with or preventing the company from immediately putting into effect the rates and charges set forth in a schedule marked 'Exhibit F' and attached to the Bill of Complaint filed in that case.

"After the issuance of this order, and on April 28, 1923, the company filed with your Honorable Body the rates and charges set forth in said schedule 'Exhibit F'. At the time the company filed such rates and charges it notified your Honorable Body in writing that the schedule 'is made effective May 1,

1923, *under the authority of an order* issued April 24, 1923, by the District Court of the United States for the Western District of Washington, Southern Division, in cause No. 166-E.'

"Your Honorable Body on the same date stamped on said schedule the following: 'Tariff accepted *as tendered* for filing.'

"On April 30, 1923, a court convened as provided for by Section 266 of the Judicial Code of the United States, dissolved the restraining order issued by Judge Cushman on April 24, 1923.

"The company has always considered and has so stated in open court, that the filing of such schedule was but a step taken by it in rendering effective the restraining order issued on April 24, 1923, and the three-judge court convened as above stated so held in an opinion, rendered by that court and filed on May 23, 1923, in the case above referred to.

"The company never did charge its patrons the rates set forth in said schedule 'Exhibit F', for the reason that prior to the filing of said schedule, the restraining order which was the basis of the filing of said schedule, was dissolved.

"In order to remove all doubt as to the company's position, the company does hereby state that the dissolution of the restraining order *ipso facto* cancelled the filing made as aforesaid on April 28, 1923, and that the rates and charges set forth in schedule 'Exhibit F' never became the effective rates and charges."

This letter and the order of the department denying schedule "F" were embodied in an affidavit filed with the court by the attorneys for the appellees, and it was proper to call same to the court's attention by affidavit. *Puget Sound Power & Light Co. v. Seattle*, 271 Fed. 958, 963.

It is apparent, therefore, that the only definite relief sought from the federal court in the bill of complaint, to-wit, the application of the rates set forth in schedule "F" was voluntarily abandoned by the appellants after filing same with the department of public works. The schedules which the appellants had originally sought to have approved by the department are referred to as schedules "B" and "C" in the Pacific case and schedule "B" in the Home case. These schedules were in their entirety permanently suspended by the department, and such order of suspension has never been reviewed and reversed in the manner required by the state statutes. By filing schedule "F", all previous schedules were superseded, as the last schedule filed is necessarily the effective schedule.

Coplay Cement Manufacturing Co. v. Public Service Commission, 114 Atl. 649, 651;
State ex rel. City of Billings v. Billings Gas Co., 173 Pac. 799, 802.

The public utility cannot play fast and loose with the department of public works by filing schedules one day and abandoning them the next, and having sought from the federal court an order establishing schedule "F" as the effective rates of the company, and having made formal application to the department of public works in the manner required by law for the application of such rates, and having failed to obtain the immediate relief sought from the

court and having abandoned the schedule filed with the department, it is submitted that the controversy as to this schedule "F" had become a moot one, and the complaint should have been dismissed on that ground as well as the other grounds upon which it was actually dismissed.

CONCLUSION.

We have shown that the statutory court and the district court properly denied the application for an interlocutory injunction and the district court properly dismissed the complaint because the appellants had not exhausted their remedies in the state courts; that the state courts have legislative powers and that under the rule of comity and convenience established in the *Prentis* case, the company must exhaust its state remedies or show that it has applied to the state courts for relief and been denied before it can go into a federal court of equity for such relief. The appellants have contended in their briefs that they are entitled to special consideration at this time because they are suffering daily from confiscation. We have shown that the order of the department of public works is prima facie correct and the presumption is that it is reasonable and just, and that no adequate showing has been made by the company at any stage of these proceedings to overcome that presumption.

By formidable array of well considered cases, and an exhaustive analysis of the bills of complaint, we believe we have demonstrated that the bills in the instant cases do not meet the requirements of good pleading and were properly dismissed for want of equity and insufficient averment of facts.

We wish to remind the court that if it shall find our contentions well taken on either of the two main grounds, the premature bringing of the suit or the insufficiency of the complaint, it must affirm the order of the district court dismissing the suits. It is evident that if the suits were prematurely brought, then regardless of the sufficiency of the complaints, the companies are not entitled to be heard in the federal court at this time. On the other hand, even though it may be determined by this court that the suits were not prematurely brought, yet if the complaints are found to be insufficient, since the companies have elected to stand on such complaints and refused to amend, the order of the district court in dismissing the complaints was proper and should be affirmed.

It is admitted by appellants, and we think there can be no doubt in that regard, that even though this court should sustain the appellants throughout, its action should be limited to a remanding of the case to the district court for further proceedings in accord with the law as it may be determined in this appeal.

We therefore respectfully submit that the order of the statutory court of April 30, 1923, dismissing the temporary restraining order and denying an interlocutory injunction, and the decree of dismissal

of the district court of January 5, 1924, sustaining the motions to dismiss and dismissing the suits, are correct and should be affirmed.

Respectfully submitted,

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Nos. 539, 540, 789 and 790.

APR 14 1924
WM. R. STANSBU
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellees.

Nos. 540 and 790.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,

Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellees.

Nos. 539 and 789.

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

REPLY BRIEF OF APPELLANTS.

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REPLY BRIEF OF APPELLANTS.

Argument.

Inasmuch as some of the questions raised by appellees were not discussed in our opening brief, we deem it appropriate to file a reply brief.

Construction of Legislative and Judicial Sections of Washington Constitution.

Counsel seek to meet our argument that section 10441 is unconstitutional because it attempts to confer a strictly legislative power upon the state courts of Washington by asserting that the Constitution of the State of Washington does not contain an express provision prohibiting the exercise by one of the departments of government of the powers of another.

It is true that the Constitution of the State of Washington does not contain such an *express* provision. But no such provision is contained in the Constitution of the United States, or in the Constitutions of the States of Kansas, New York, Ohio, Pennsylvania, North Dakota and Wisconsin. Nevertheless, it has been expressly held, in the following cases cited by us in our opening brief, that under constitutional provisions identical with that of the State of Washington, the legislative, executive and judicial powers "are as clearly separated as though the framers of the constitution had said so in terms", and that power can be "exercised only by the particular department to which it has been delegated".

Western Union Tel. Co. v. *Myatt,* 98 Fed. 335;
State ex rel. Godard v. *Johnson,* 61 Kan. 803;
In re Sims, 54 Kan. 1;
State ex rel. Taylor v. *Missouri-Pacific R. R. Co.,* 76 Kan. 467;

Dash v. *Van Kleeck,* 7 Johns. (N. Y.) 477, 508;
City of Zanesville v. *Zanesville Tel. & Tel. Co.,* 63 Ohio St. 442;
State ex. rel. Montgomery v. *Rogers,* 71 Ohio St. 203;
DeChastellux v. *Fairchild,* 3 Harris 18.

There is no authority to the contrary.

Counsel for appellees further assert that the Supreme Court of the State of Washington has held that legislative power can be conferred upon the courts of that State. They cite in support of this statement three decisions which hold that *quasi* judicial or *quasi* legislative powers may constitutionally be conferred upon administrative bodies or officers. With this proposition, of course, we have no quarrel. As said in the first case cited by counsel:

> "*Quasi* judicial powers have from *time immemorial* been conferred upon administrative bodies and officers, such as assessors, boards of county commissioners, boards of equalization, auditors, and even sheriffs, who frequently have to decide as to the value of property in cases of exemptions and in other respects."
>
> *Bellingham Bay Improvement Co.* v. *New Whatcom,* 20 Wash. 53.

But the power attempted to be conferred by Section 10441 is not *quasi* legislative; it is legislative, and it must be admitted that legislative powers have *not* from *time immemorial,* or at any time, except in Virginia and Oklahoma, been conferred upon courts.

The cases cited by counsel for appellees, therefore, are not in point.

We quote again the emphatic language used by the

Supreme Court of the State of Washington in *Territory ex rel. Kelly* v. *Stewart,* 1 Wash. 98, 110:

> "We hold that a judicial court cannot exercise legislative functions and that the *legislature cannot impose such power upon it.*"

And from *In re Bruen,* 102 Wash. 472:

> "These functions being essentially judicial and inherent in the courts, we are of the opinion that the legislature has attempted to create a judicial tribunal which, at the same time, has administrative and delegated *legislative* powers. *Such a system is not warranted under our constitutional form of government.* The legislative, executive and judicial functions have been carefully separated and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system."

Reluctance to Hold State Statute in Conflict with State Constitution.

This court has stated its reluctance to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state courts. Counsel cite these expressions in support of the ruling of the lower court that the companies must first seek relief in the state courts. The cases do not sustain this contention. To prevent the confiscation of their properties, the companies were entitled to resort to the United States courts as a matter of right. Questions of law necessary to the determination of the case, state as well as federal, must be disposed of by the United States courts. And, however desirable it may be that the state questions be first passed upon by the state tribunals, nevertheless the United States courts may not defer their

consideration of the case until the suitor has sought and obtained a decision of the state courts.

> "Many of the objections made raise questions as to the meaning and effect of recent statutes of the state which have not yet been construed by its courts; and we are reluctant to pass upon these questions. Some of the objections raise issues of fact on which the evidence is submitted by affidavit, and is, in certain respects, conflicting. *But in all the cases jurisdiction rests upon substantial federal questions. The objections to the validity of the legislation and of the assessments, whether arising out of the Federal Constitution or out of the constitution or statutes of the State, may be presented in a single suit. We must, therefore, determine state, as well as federal, questions.*"
>
> *Southern Railway Co.* v. *Watts*, 260 U. S. 519, 522.

But if a United States Court should be reluctant to hold that one section of a state statute is in conflict with the state Constitution before the state courts have passed upon that question, it is clear that this reluctance should extend to *all* the sections of that statute.

Counsel for appellees, however, take a most remarkable position. Though the Supreme Court of the State of Washington has, time and time again, held that legislative powers cannot be conferred upon the courts of that state, yet they urge that section 10441, which clearly does confer legislative power upon the state tribunals, should not be held unconstitutional in advance of a state decision to that effect. At the same time they ask that, despite the express and positive provisions of sections 10424 and 10429 forbidding the courts of the State of Washington to grant a stay in a case of this kind, this court should hold that the state courts have inherent power to do that which sections 10424 and 10429 *expressly forbid them to do.*

It is true that they assert that they do not wish "to be understood as absolutely taking the position that these statutes are unconstitutional" (Appellees' Brief, p. 35). But just how this court is to hold that the state courts of Washington may grant a stay to the companies, despite the express and positive provisions of sections 10424 and 10429 and not hold that these sections are unconstitutional, it is impossible to perceive.

It is true that counsel for the appellees find themselves in a dilemma. If, owing to the reluctance of this court to pass upon the constitutionality of a state statute in advance of a decision of the state tribunal, it cannot hold section 10441 invalid, it equally cannot hold sections 10424 and 10429 invalid. But if sections 10424 and 10429 are valid, then the companies cannot obtain a stay in the state courts, and the case of *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, is decisive.

Moreover, the cases cited by counsel for appellees holding that the Washington state courts have inherent power to grant a supersedeas are not in point. In no one of them was there involved a statute which contained an express provision prohibiting the court from granting a stay or supersedeas. The statutes involved in each of these cases were silent in respect to the power of the court to grant a supersedeas or stay. The cases, therefore, simply declare the power of the court to grant a supersedeas, pending an appeal to it, under express provisions of section 4, article IV of the state constitution that it shall "have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, *and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.*"

In the cases cited, therefore, the court was considering only its power to grant supersedeas in aid of its revisory and appellate jurisdiction. They are not in point here. And will counsel explain to this court just how the state

court could reach the conclusion that it possessed inherent power to suspend the order of the department without at the same time holding invalid the provisions of sections 10424 and 10429 which in express terms prohibit such action.

The Complaints are Sufficient.

A large number of objections are made to the sufficiency of the complaint in the *Pacific* case and in the *Home* case.

For instance, it is asserted that the complaint in the *Pacific* case is insufficient because it does not allege *in terms* that the company has filed a certified copy of its articles of incorporation in the office of the Secretary of State and appointed a statutory agent, which appointment must be in writing and contain certain information. But the complaint in the *Pacific* case, unlike the complaint considered in the case of *Southern Bell Tel. & Tel. Co.* v. *Railroad Commission,* 280 Fed. 901, 906, contains an allegation that the company "*has complied with all the laws of the State of Washington relating to foreign corporations*" and "has paid its annual license fee last due."

It will not be denied that a complaint filed by a foreign corporation containing such allegations would be good in the state courts of Washington.

In *State ex rel. Ami Co.* v. *Superior Court,* 42 Wash. 675, the court said:

> "In its application for the writ of review the petitioner avers that the Northern Pacific Railway Company is a corporation organized and existing under the laws of the State of Wisconsin and is authorized to do business as a foreign corporation in the State of Washington. This, of itself, shows a compliance with the statute."

Again, even assuming for the sake of argument that the precise allegations contended for by appellees are necessary if this suit had been brought in the state courts, nevertheless it is well settled that a foreign corporation may maintain an equitable suit in a United States court without any allegation whatsoever as to compliance with the laws of the state relating to foreign corporations.

David Lupton's Sons Co. v. *Automobile Club of America*, 225 U. S. 489, 500;
Groton Bridge & Mfg. Co. v. *American Bridge Co.*, 151 Fed. 871, 874;
Thomas v. *Birmingham Ry. Light & Power Co.*, 195 Fed. 340, 342;
Barling et al. v. *Bank of British North America*, 50 Fed. 260, 261;
Blodgett v. *Lanyon Zinc Co.*, 120 Fed. 893, 897;
Columbia Wire Co. v. *Freeman Wire Co.*, 71 Fed. 302, 307;
Kawin & Co. v. *American Colortype Co.*, 243 Fed. 317, 322;
Dunlop v. *Mercer*, 156 Fed. 545, 551;
Butler Bros. Shoe Co. v. *United States Rubber Co.*, 156 Fed. 1, 18.

Moreover, jurisdiction of the United States court in the *Pacific* case was invoked not only on grounds of diverse citizenship, but also on the ground that the property of the company was being confiscated in violation of the Constitution of the United States.

Another contention of appellees, if we understand it correctly, is that the complaints do not state a cause of action because it is apparent on the face of the complaint that after making of the order of March 31, 1923, the companies did not file a fair and reasonable schedule of rates with the department. It is later contended, also,

that the companies did file with the department, after March 31, 1923, schedules of rates; that these schedules were subsequently denied by the department and consequently, these entire controversies are moot.

A statement of the facts is, we think, a complete answer to this argument.

As stated in our opening brief, the companies did in September and October, 1922, file schedules of rates with the department, which rates the companies then and at all times since asserted to be just, fair and reasonable rates. The operation of these schedules was suspended by the department almost immediately upon their filing. On March 31, 1923, the department made an order finding the rates filed by the companies to be unjust, unfair, unreasonable and more than sufficient rates. It further found that the rates which were then in existence would give the companies a return of 6.01 per cent. on the cost of the properties (Tr. *Pacific* case, p. 51; *Home* case, p. 38). Parenthetically, we may say that the department obtained this result by reducing the depreciation rate of the companies from 5.75 per cent. to 3.5 per cent., and the payment made by the Pacific Company to the American Telephone and Telegraph Company and the Home Company to the Pacific Company under what is commonly called the "four and one-half per cent. contract" (see *Southwestern Bell Tel. Co.* v. *Public Service Commission*, 262 U. S. 276) from four and one-half per cent. of certain of the gross revenues of the company to 90 cents per station. These reductions, it was estimated, would amount, in the year 1923, to $603,087 for the item of depreciation and $224,517 for the item of the four and one-half per cent. contract, or a total disallowance by the department of the actual operating expenses of the companies of $827,604. (The foregoing figures are obtained from statements appearing on pages 51 and 78 of the Transcript in the *Pacific* case, and pages

38 and 66 of the Transcript in the *Home* case.) With respect to the reduction of the rate for depreciation, it was not claimed by the department that three and one-half per cent. was the proper rate to be allowed for depreciation, but it was argued that the companies' depreciation reserve was too great and that the flow into such reserve should be reduced for a period of two years (Tr. *Pacific* case, p. 46, *Home* case, p. 42).

In this connection we may say that the engineers for the department testified that the proper rate of depreciation for the companies was 5.25 per cent. per annum, and that the testimony of the engineer for the City of Seattle was that upon exchange property only the proper rate was 5.88 per cent. per annum (Tr. *Pacific* case, p. 64; *Home* case, p. 52).

Now, counsel for appellees say that "a reading of the department's order will disclose two of the principal items upon which the department and the appellants differ are depreciation and the four and one-half per cent. contract." As a matter of fact, a reading of the department's order will conclusively show that these two items and the question as to whether the cost of the property or its fair value is to be used as the base upon which the companies are entitled to earn, are the *sole* questions of controversy between the department and the companies. If the majority members of the department had allowed a proper rate for depreciation and had allowed the inescapable payments under the four and one-half per cent. contract, it is admitted that the rates continued in effect by them would have permitted an earning during the year 1923 of but 3.36 per cent. upon the *cost* of the properties. (Tr. *Pacific* case, p. 78; *Home* case, p. 66.) The department, however, as we have said, reduced the depreciation rate and refused to allow as an expense the full amount of the payments made under the four and one half per cent. contract. Having done so, it found

that the existing rates would permit a net earning in the year 1923 of 6.01 per cent. upon the *cost* of the properties and that rates which permitted such an earning upon cost were just, fair, reasonable and *sufficient* rates.

It is now asserted by counsel for appellees that when the department made this order finding the existing rates to be sufficient, the companies should have immediately filed new schedules of rates with the department. But what would it avail the companies to file new schedules with the department? The department had found that the existing schedules were just, fair, reasonable and sufficient. The department would, therefore, immediately refuse to put in operation any schedule of rates which the companies filed with it. Moreover, if the companies filed new schedules and the department denied such schedules, then under the argument of counsel for appellees the companies would still be without a schedule of rates on file with the department, and they could, therefore, not maintain suits in any court.

Nor is there anything in the contention that these cases are moot cases. The companies on April 24, 1923, filed their complaints in the United States court and applied for restraining orders. These orders were granted, but only on the condition that the companies would put into effect, pending the hearing, the schedule of rates which the dissenting member of the department had found to be just, fair and reasonable rates. Upon the making of the restraining order, and in compliance therewith, the companies filed that schedule with the department. It was distinctly stated in writing in each of the schedules so filed, that such schedule "is made effective *May 1, 1923, under the authority of an order issued April 24, 1923,* by the District Court of the United States, for the Western District of Washington, Southern Division." The department did not accept these schedules unconditionally. It stamped thereon the following: "Tariff accepted *as tendered* for filing."

On April 30, 1923, one day before these rates could become effective in any event, the restraining order was dissolved and it is clear that the dissolution of that order cancelled the filing made by the companies on April 28th. But how does the filing of a schedule of rates, in compliance with an order of a United States court, and the subsequent cancellation of such schedule resulting from the dissolution of such restraining order, make these controversies moot controversies?

On pages 57 to 77 of appellees' brief, it is urged that the complaints are fatally defective in that they are barren of allegations as to the net revenues of the companies, the detailed items "which make up fair value", the items of expense, including depreciation and the payments of the four and one-half per cent. contract, and the segregation of toll and exchange and intrastate and interstate values and revenues. Moreover, it is asserted that many of the figures stated in the complaint are incorrect.

Considering that the only controversies between the department and the companies are the questions of the amount to be allowed for depreciation, the amount of the payments allowed as an operating expense under the four and one-half per cent. contract, and the question as to whether the cost of the property or its fair value is to be used as a base upon which the companies are entitled to earn, it would seem that the complaint contained full information concerning these items and was not open to the attack made upon it.

However that may be, a more careful reading of the complaints and the exhibits attached thereto and forming a part thereof, would have shown counsel for the appellees the unsoundness of their argument.

The complaints do set forth the net earnings derived from the companies' business within the State of Washington stated in rate per cent. annual return on the cost

of its property on the one hand, and on the fair value on the other, for the years 1919, 1920, 1921 and 1922. It further alleges that the amounts by which the net revenues derived by the companies from their telephone and telegraph business in the State of Washington and in the cities of Seattle, Tacoma and Spokane, were less than eight per cent. of the cost of the property used and useful in each case in the rendition of such telephone service within said state and for the said cities, were, for each of the years 1919, 1920, 1921 and 1922 certain definitely stated sums.

It would seem that this is precisely what a complaint should contain. It is urged, however, that this is a "roundabout way of pleading net revenue". If so, this court erred in the case of *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, when it said that the complaint in that case "aptly stated the ultimate facts upon which the company asked relief omitting any mere statements of evidence". A statement like the statement contained in these complaints is found in the complaint in the *Prendergast* case, and there is contained in the complaint in that case no *direct* allegation as to net revenues expressed in dollars of the New York Telephone Company.

If, however, it be material to put in a complaint of this kind the amount *expressed in dollars* of the net revenues of a company, that amount can readily be determined by a simple arithmetical process from the figures set forth in the complaints in these cases. It is set forth in the bill of complaint that the net earnings for the year 1922 on the cost of the plant were, for the State of Washington, 3.17 per cent., for the City of Seattle .19 per cent. and for Tacoma .89 per cent., and that these earnings were less than an 8 per cent. net return on the cost of the property by the following amounts:

State of Washington.....	$1,310,651
City of Seattle.....	1,192,580
City of Tacoma.....	202,121

The difference between 3.17 per cent. and 8 per cent. is 4.83 per cent. Consequently $1,310,651 represents a net return of 4.83 per cent. on the cost of the property of the Pacific Company in the year 1922. But if a net return of 4.83 per cent. on the cost is $1,310,651, then a net return of 3.17 per cent. on cost is $860,918. The net return, therefore, of the Pacific Company in the year 1922 was $860,918 which stated in rate per cent. annual net return on cost is 3.17 per cent.

A like computation will show that the net revenue for the City of Seattle in the year 1922 was $29,013 and for the City of Tacoma, $25,301.

In like manner the net revenues of the Pacific Company can be obtained for the years 1919, 1920, and 1921, and the net revenues of the Home Company for the years 1919, 1920, 1921 and 1922.

Nor are the figures used in the complaint open to the attack made upon them on pages 58, 59 and 60 of brief of appellees. A *slight* consideration of the order of the department, which appellees are presumed to defend, but which they are apparently themselves attacking on pages 60 to 62 of their brief, would have demonstrated the error into which counsel have fallen. It is asserted that in *estimating* the net return for the year 1923 a rate base was used by the department of $34,789,635; that this rate base corresponds to the figures alleged in the complaints as to the cost of the property as of *December 31, 1922;* that the cost of the Pacific Company property as of December 31, 1922, was $29,347,254 and the cost of the Home Company property as of that date was $4,266,899, or a total *as of that date* of $33,614,153. It is, therefore, asserted that the department used as a rate base in determining the estimated net return for the year 1923 an amount which was $1,175,482 *in excess* of the cost figure pleaded by the plaintiffs. But the rate base used by the department in estimating the net return for the *entire year*

1923 is *not* the cost of the property as of *December 31, 1922.* It is distinctly stated in the order of the department that the rate base to-wit: $34,789,635, is the *"estimated average* plant value *for the year 1923,* plus working capital" (Tr. *Pacific* case, p. 51). Now it is true that in fixing a rate base the department considers value and cost as synonymous terms, and consequently the companies' cost figures and the department's value figures will coincide if the companies' cost figures and the department's value figures relate *to the same date.*

But the figures for *December 31, 1922,* and the figures for the *year 1923* cannot coincide unless there has been absolutely no change in the physical properties during the entire year 1923. What the department did and what counsel has failed to notice is that the department added to the cost of the properties as of December 31, 1922, *i. e.,* $33,614,153, one-half of the *estimated* net additions and betterments *to be* made to the properties in the year 1923. How could the department on March 31, 1923, determine with mathematical precision the average plant value for the whole year 1923.

Surely the words "estimated" and "average" ought to have prevented counsel from making so obvious an error.

Again, on page 59 counsel fall into the same error by attempting to apply the percentage of net earnings, given *for the year* 1922 in the complaint, to the plant figures as of *December 31, 1922,* in order to get the net revenue for the year 1922. Because of this obviously incorrect application, a result different from the figures in the complaint is obtained. Our net earnings are, of course, computed on the *average* plant value or average plant cost for the year 1922 and if these figures had been used by counsel the differences found by them would have disappeared.

Nor is there anything in the contention that the complaint is defective in that it fails to segregate toll and

exchange, and inter- and intra-state values, revenues and expenses.

With respect to the first—segregation of toll and exchange—a statement of the scope and character of the department's investigation, and of the order under complaint will, in our opinion, effectually dispose of the contention. In October, 1921, two civic organizations petitioned the department to investigate and revise the company's rates (Tr. *Pacific* case, p. 38). The department advised these petitioners that "*an investigation and study of the entire system of the Pacific Telephone & Telegraph Company in the State of Washington*" would be necessary, and that "the department would proceed to that end" (Tr. *Pacific* case, p. 38). The department did proceed to investigate "the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company" (Tr. *Pacific* case, p. 38). "The department's engineering and accounting staff was forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, *a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the department*" (Tr. *Pacific* case, pp. 38-9).

The full history of the proceeding appears in the record at pages 38-40. An examination of the department's "Findings of Fact", beginning at page 40, will disclose that it was dealing with each company's entire property, revenues and expenses *within the State of Washington*. Toll rates throughout the state were directly involved, and exchange (*i. e.*, local) rates for Seattle, Tacoma, and Spokane—which three exchanges together constitute 71% of the entire property and business within the state—were likewise directly involved; but the financial result for the state as a whole upon the

entire business within the state was also involved. The department was under the legal duty of prescribing just and reasonable rates. What it did was to deny the companies any increases whatever and to prescribe the existing rates without change. The bill alleges in due form that these rates prevent the company from earning a fair return on the fair value of the property devoted to the service within the state. The only purpose of segregating the exchange property and business would be to show confiscation with respect to it separately; likewise as to the toll. But we were not obliged to do that, under well settled principles repeatedly announced by this court, although we might have done so if we had so elected. (*Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585). *The point is that under the department's order complained of the companies cannot earn a fair return on their property.*

The second contention above referred to is that the averments in the bill showing confiscation are insufficient to state a cause of action, upon the idea that the company has some amount of interstate property and business in the State of Washington, and that the court must take judicial notice that this is so in the face of the fact that there is nothing anywhere in the record to show it. In other words, what appellants ask the court to do is to go outside the record and import an alleged fact into the case and thereby impeach a bill that is good on its face and on the face of the record. Even upon the assumption that the court can, or will, do this, which we do not believe to be the law, a consideration of other facts we shall presently call attention to demonstrates that the point is not well taken. Before discussing the matter in that aspect, however, we call attention to the averments of the bill in this respect.

The point does not arise in the case of the Home Telephone and Telegraph Company of Spokane, which is

purely a local exchange company, as pointed out hereinafter. We now refer, therefore, to the case of the Pacific Company, Case No. 540. The bill is printed in the record in that case at pages 1 to 9, inclusive, to which the order complained of is attached as an exhibit, appearing at pages 38 to 90.

In Paragraph III, page 2, the bill alleges that plaintiff seeks to enjoin the enforcement of the order entered on March 31, 1923, "which said order prescribes the maximum rates and charges to be charged by plaintiff for telephone service in the State of Washington, for the reason that *said rates and charges are confiscatory of plaintiff's property used or useful in furnishing said service to the public.*" The rates and charges are for intrastate telephone service exclusively, of course, those being the only rates and charges over which the state has any jurisdiction. Therefore, the property to which the averment refers is the property devoted to that service, "plaintiff's property used or useful in furnishing said service to the public". This property is largely exchange property, *i. e.,* property devoted purely to exchange or local telephone service and, to a small extent, toll property, *i. e.,* property devoted to intrastate toll service. It was with respect to that property and that service only that the department was dealing, or could deal.

In Paragraph X, on page 4, the bill alleges that the cost to plaintiff of its property in the State of Washington "now being used or useful in furnishing its telephone and telegraph service to the public therein and exclusively devoted to the rendition of that service" was the amount there stated. That paragraph of the bill shows separately also the cost of the purely local or exchange property in Seattle and Tacoma, and shows that such property in the two cities constitutes sixty-eight per cent. of plaintiff's entire property in the State of Washington. In

the same paragraph the fair and reasonable value of the same property is alleged.

In Paragraph XII, page 5, the bill shows, in terms of rate per cent. of annual return upon the cost of the property and, separately, upon its fair value, the net earnings of the plaintiff from the rates here complained of as being confiscatory, and the property referred to is that "used or useful in furnishing said service and exclusively devoted to the rendition thereof". The averments in this paragraph cover the years 1919 to 1922, inclusive, and show that the rates fall far short of anything approaching a fair return. The averments of Paragraph XIII, page 6, set forth the same facts in terms of dollars. Similar averments are made in Paragraph XIV, showing the return "upon the fair and reasonable value of *said property in said state*", etc.

In short, the averments of the bill throughout are directed against an order of the regulatory body prescribing the company's rates for telephone service *within* the State of Washington, that is intrastate toll and exchange (intrastate) rates, and on the face of the bill, the property costs and values alleged relate expressly to "plaintiff's property used or useful in furnishing *said service* to the public". The rate per cent. of actual return earned by the company under these rates complained of is a per cent. of the fair value of the same property, and so alleged. The allegation of what constitutes a fair return set forth in Paragraph XI, page 5, is a *"per cent of the fair and reasonable value of its property used or useful in the rendition of the service covered by the rates in question"*.

If we approach the matter from another angle an analysis of the averments of the bill demonstrates that it states a cause of action. In Paragraph X, on page 4 of the record, the bill alleges the cost to plaintiff, and also the fair and reasonable value, separately, of the

Pacific Company's "property in the State of Washington * * * now being used or useful in furnishing its telephone and telegraph service to the public therein, and exclusively devoted to the rendition of that service". The same paragraph sets forth the corresponding figures of cost and fair value of the company's "property constituting its Seattle Exchange and now being used and useful in furnishing telephone service therein"; and likewise the corresponding figures for the "Tacoma Exchange". This paragraph further alleges that the exchange property in the two cities of Seattle and Tacoma constitutes 68% of the total cost and of the total value of the entire property of the company in the State. This figure of 68% is of course derivable from the specific dollar figures set forth and is a mere computation for convenience.

In Paragraph XIII on page 6 the bill alleges in dollars the amount by which the rates here complained of fall short of yielding to the company 8% on the cost of the same property for each of the years 1919 to 1922 inclusive and separately with respect to the company's entire property in the state, the City of Seattle, and the City of Tacoma. These figures for the year 1922 are there pleaded as follows:

Year 1922, State of Washington.....	$1,310,651
Year 1922, City of Seattle.....	1,192,580
Year 1922, City of Tacoma.....	202,121

The sum of the deficiency attributable to the business in the two cities is $1,394,701. Subtracting from this last figure the total deficiency from the entire business leaves $84,050. That is to say, the company alleges that its property is confiscated by these rates applied to the business of the whole state (including Seattle and Tacoma) by the amount of $1,310,651, and that not only did this confiscation result entirely from the Seattle and

Tacoma rates but there remained a further deficiency of $84,050, which was made good by the business in the state outside the two cities.

These computations are based upon a rate of 8% as being a fair rate of return as alleged in Paragraph XI of the bill, but it is apparent of course that the same relation between the figures would exist if 7% or any other rate per cent. were assumed and applied.

With this foundation, we come to the point, which is that the property in Seattle and Tacoma is, and is alleged in the bill to be, *exchange property,* that is property devoted to local telephone service within those two communities, the technical word or word of art in the telephone business being "exchange". So that it appears therefore upon the face of the bill that the confiscation complained of results from the exchange rates prescribed by the Department for Seattle and Tacoma. Toll service and toll property, whether interstate or intrastate, are not involved in any way. It is true that we complain of the entire schedule prescribed by the Department for the state as a whole and allege that the effect of the entire schedule is to confiscate our property; but that we have a right to do, and that states a perfectly good cause of action—in fact states the usual confiscation case. In a suit of this kind, involving a state-wide investigation of the company's rates, and state-wide rates prescribed by regulatory order, the utility will not ordinarily be heard to complain of the insufficiency of the rates in detail, as for example the rate for a particular class of service or the rate in a particular locality. The gravamen of the complaint is that the order of the Commission has the effect of rendering the entire business within the state unprofitable to the point of confiscation. Such a case is plainly stated by the bill herein and, as we have pointed out, it plainly appears that the confiscatory result is attributable entirely to the local

rates applied to local service and local property in Seattle and Tacoma.

It appears, therefore, that if the bill be regarded within its four corners, it plainly and incontestably states a cause of action for equitable relief on the ground of confiscation.

We believe the foregoing discussion is a complete answer to this contention. There is, however, another view of the matter that seems to us decisive also.

In determining the value of the property the Department started with the value found by it in 1914. On page 41 of the record herein the department says:

> "As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922."

The 1914 value was $19,382,209 (*Public Service Commission* v. *Pacific Telephone & Telegraph Co.*, P. U. R. 1916 D, page 947, at page 959). That was a case similar to this, involving a finding of value and a rate order. In that case the commission did make a segregation of inter- and intrastate property, and *found that the interstate property constituted 13/100 of one per cent. of the entire property in the state.* The finding is as follows:

> "VI. That the relative value of the use to which such property in the state of Washington is actually put, in the conducting of interstate business and state business respectively for the year 1914, is 13/100 per cent. and 99 87/100 per cent. of respondent's entire property within the state of Washington." P. U. R. 1916 D, p. 958.

Manifestly, therefore, the interstate property and business is too small a portion of the total to affect the result, and is negligible. No doubt the department here

so regarded it and for this reason did not make the separation. That this is the probable and only reasonable explanation is further indicated by the circumstance that the state statute provides for such separation under ordinary circumstances. Section 10441, page III of the appendix, appellant's original brief herein.

The decision of this court in the *Minnesota Rate Cases* (230 U. S. 352, at page 469) is in point. We refer to the decision with respect to the Minneapolis & St. Louis Railroad Company, as to which this court held that confiscation was established, notwithstanding the failure of that company to show the value of its intrastate property. The decision in the *Missouri Rate Cases* (230 U. S. 474, at page 507) is also in point, wherein the court found that confiscation was proved in the cases of three of the railroads involved, there being no segregation of interstate and intrastate property, etc., holding "that errors attributable either to valuation or to apportionments *cannot be regarded as sufficiently great to change the result*". (Italics ours.)

With respect to the Home Company of Spokane this point cannot arise, since the property of that company is exchange or local property entirely.

The Rate Provision in the Franchise of the Home Company has been Terminated.

In a separate brief Mr. Alex M. Winston of Spokane asserts that the Home Telephone and Telegraph Company of Spokane is not entitled to relief because "it is bound by the terms of a franchise contract now existing between it and the City of Spokane for the furnishing of telephone service".

The gist of his argument in this case is admirably stated in the brief filed by him in the Supreme Court of

the State of Washington in the *Spokane Falls Gas Light Company Case,* 119 Wash. 107. In that brief he said:

> "The franchise rate being now unremunerative, the contract, therefore, as we see it, should not be entirely disregarded. It must be given some effect. Our legislature recognized this principle when it provided that such contracts, when terminated by order of the commission, 'shall be terminated by the company AS and when directed by such order' (Capitals ours). This, in our opinion, shows the intent of the legislature. It is a cardinal rule of construction that every word in an act must, if possible, be given some effect. Had it been the intention of our lawmakers to have permitted the utility, acting under the authority and order of the Commission, to wipe out, abrogate and forever set aside the terms of a franchise contract, then the word 'as' would not have been found in the act. Its presence there is, to us, a landmark, so to speak, showing that the legislature intended that effect should be given to the provisions of franchise contracts."

The court repudiated this argument saying:

> "Counsel for the city calls attention to § 34 of the act of 1911, Rem. Code, § 8626-34 (Remington's Compiled Statutes, § 10370), which says that a gas company, among others, shall not be prevented from continuing to furnish its product under any contract in force at the date the act takes effect, or upon the taking effect of any schedule of rates subsequently filed with the commission as provided by the law, at the rates fixed in such contract, provided that the commission shall have power, in its discretion, to direct by order that the contract shall be terminated by the company, and thereupon such contract shall be terminated by such company *as* and when directed by the order. Therefrom it appears to be argued that the rates provided in the contract should continue until the commission makes an order specifically declaring and directing in so many words that the contract shall be terminated. We may overlook the fact, if need be, that, upon the petition of the city, the rates were reduced in 1913, and that in

1918 they were increased upon the application of the gas company, and consider the franchise contract as having been wholly undisturbed until the present time, and still we would be compelled to determine, as we do determine, that the present order of the department of public works is just as effective as if, after fixing the rates, there had been added therein the words *'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated,'* or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material."

It is true that the Supreme Court in that case was discussing section 10370 of Remington's Compiled Statutes, but section 10370 is identical with 10379 relied upon by Mr. Winston, except that the first relates to gas companies, the second to telephone companies.

We therefore respectfully pray that the orders of the statutory court and the decrees of the District Court be reversed.

Respectfully submitted,

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PACIFIC TELEPHONE & TELEGRAPH COMPANY *v.* KUYKENDALL, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

Nos. 540 and 789. Argued April 17, 1924.—Decided May 26, 1924.

1. When the jurisdiction of a state court to review orders of a commission fixing rates is confined to determining on the record certified by the commission whether the order is lawful and reasonable and whether evidence was improperly excluded, without power to pass on the weight or sufficiency of evidence or to enter any new order in lieu of the one appealed from, the remedy is purely judicial, and need not be invoked by a party complaining of the rates fixed as confiscatory, before seeking relief in a federal court. Remington's Comp. Washington Stat. 1922, § 10428, considered. P. 200.
2. A state statute empowering a commission after hearing to refuse an increase of rates proposed by a public utility, cannot, by forbidding supersedeas until a final judicial decree has been rendered in the state courts, prevent recourse to a federal court for temporary relief by injunction. P. 201.
3. Under the law of Washington, Rem. Comp. Stat. 1922, § 10441, providing for revision of administrative valuations of the property of public utilities, the function of the state courts is not merely judicial but also legislative, since they can pass upon the weight of evidence, and can set aside a valuation and make a new one. *Keller* v. *Potomac Co.*, 261 U. S. 428. *Id.*
4. The fact that a public utility had resorted to the state courts, acting legislatively, to change a valuation of its property, would not bar it from seeking relief in the federal court against rates based on the valuation as approved by the state courts. P. 203.

5. Comity usually prevents seeking such relief in a federal court before the legislative remedy in the state courts has been exhausted. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210. P. 203.
6. But when a public utility, by reason of an order reinstating rates which it sought to increase, is suffering daily from confiscation, and under the state law (Rem. Comp. Stat. 1922, § 10429) no stay is allowable pending revision by the state courts, comity does not prevent relief by a federal court. P. 204.
7. A litigant whose constitutional rights are being invaded and to whom a statute denies a supersedeas in the state tribunals may properly base his application for equitable relief on the effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state constitution. *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288. P. 205.
8. Where appeal from an order refusing an interlocutory injunction is followed by an appeal from a final decree dismissing the bill, on the same ground, the first appeal should be dismissed and relief be granted under the second. *Id.*

Reversed.

APPEALS from decrees of the District Court refusing an interlocutory injunction and dismissing the bill, in a suit to enjoin interference with increases of telephone rates.

Mr. Otto B. Rupp, with whom *Mr. Frank T. Post*, *Mr. H. D. Pillsbury*, *Mr. C. M. Bracelen* and *Mr. W. V. Tanner* were on the briefs, for appellant.

Mr. John H. Dunbar, Attorney General of the State of Washington, *Mr. Thos. J. L. Kennedy* and *Mr. Alex M. Winston*, with whom *Mr. H. C. Brodie*, *Mr. J. M. Geraghty* and *Mr. E. K. Murray* were on the briefs, for appellees.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

These are two appeals from the District Court in the same case involving the question of the confiscatory char-

acter of rates for telephone service within the State of Washington and in the cities of Seattle and Tacoma, to which rates the appellant company is limited by a refusal of the Department of Public Works to permit an increase thereof. The Pacific Telephone & Telegraph Company is a corporation of California authorized to do business in Washington and owning a plant covering the State. It owns all the stock of the Home Telephone Company which owns and operates the Spokane Exchange. A similar question as to confiscatory rates has arisen in respect to that company and that exchange, but a separate bill was filed by that company and is considered on appeal in a case reported next after this.

This bill by the Pacific Company seeks an injunction against the Department of Public Works of the State to prevent it from interfering with the maintenance and collection of the increased rates the Company proposes in all parts of Washington except Spokane. A court of three judges was organized to hear the application for a temporary order. The suit depended for jurisdiction both on the diverse citizenship of the parties and upon the averment that the order of the Department of Public Works if enforced would deprive the company of its property without due process of law, in violation of the Fourteenth Amendment. The court set aside the temporary restraining order issued by the District Judge on the filing of the bill and denied the application for temporary injunction. Appeal was taken direct to this Court under § 266, Jud. Code, as amended by the Act of March 3, 1913, c. 160, 37 Stat. 1013. After the denial of the temporary injunction, the District Judge heard the case on a motion to dismiss the bill and granted the motion, and from this final decree a second appeal was taken.

The bill of complaint shows that on August 8, 1919, the Public Service Commission of the State, the predecessor of the Department of Public Works, made an order

prescribing maximum rates and charges to be charged by the Pacific Company on and after that date within the State of Washington which are made an exhibit to the bill; that on September 20, 1922, the company filed a schedule of rates with the Department of Public Works increasing rates to be charged for exchange telephone service in all the exchanges owned by the company in Washington; that the Department on September 24, 1922, suspended the rates for thirty days, and that after numerous hearings as to their reasonableness, the Department by a majority of two members on March 31, 1923, denied the increase. The bill further averred that the fair and reasonable value of the property of the company in Washington, not including the Spokane plant, was $35,616,896, which includes $20,852,067 for the Seattle plant, and $3,457,290 for that of Tacoma, and that this estimate includes nothing for franchises and nothing for going concern; that the fair annual return which the company was entitled to earn was eight per cent. on this value, whereas the actual return was as follows:

	Cost.	Fair value.
Year 1919, State of Washington	4.97%	3.67%
Year 1919, City of Seattle	3.97%	2.66%
Year 1919, City of Tacoma	.98%	.81%
Year 1920, State of Washington	4.42%	3.33%
Year 1920, City of Seattle	1.85%	1.29%
Year 1920, City of Tacoma	.89%	.74%
Year 1921, State of Washington	3.30%	2.58%
Year 1921, City of Seattle	.69%	.52%
Year 1921, City of Tacoma	.58%	.48%
Year 1922, State of Washington	3.17%	2.58%
Year 1922, City of Seattle	.19%	.15%
Year 1922, City of Tacoma	.89%	.75%

that such returns were confiscatory and a violation of the rights of the company under the Fourteenth Amendment; that therefore the order of March 31, 1923, was void; that the company had no adequate remedy at law; that, if an attempt were made to enforce the rates it proposed to

make, the Department of Public Works and others in state authority, defendants, would, unless restrained by the court, institute proceedings to compel compliance with the confiscatory schedule, and that the company and its officers and employees would be subjected to a multiplicity of suits, and incur criminal penalties prescribed by the laws of the State.

By the statutes of Washington (§ 10428, Remington's Comp. Stat. 1922), any complainant affected by any order of the Commission (now the Department), may within thirty days apply to the Superior Court of the proper county for a writ of review "for the purpose of having its reasonableness and lawfulness inquired into and determined." The Commission certifies the record upon which the court is to enter judgment affirming or setting aside the Commission's order. If reversed for failing to receive proper evidence offered, the case is to be referred back to the Commission to receive the evidence and enter a new order. The court may remand any case reversed by it to the Commission for further action. It is clear that the function to be performed by the Superior Court under this section is judicial. It does not fix rates or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks into the reasonableness and lawfulness of the order of the Commission and is to determine whether evidence which should have been received was rejected, and in that case is to send the case back to the Commission for a new order. The court does not act legislatively.

Instead of applying to the Superior Court of the State therefore, application was made by the bill herein to the Federal District Court within the thirty days to restrain the order of the Department as violative of the Fourteenth Amendment.

By § 10424, Remington's Comp. Stat. 1922, relating to the filing of tariffs increasing rates and providing for a

hearing on such proposed increase and the suspension of the schedule pending the hearing, it is declared that:

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court."

It is apparent from these provisions that, after the Commission finally denied the increase of rates applied for, the company had exhausted its administrative remedy to avoid the alleged confiscatory rates under which it was compelled to render the service. It had, therefore, no recourse but to a court. Both by reason of diverse citizenship and because of the federal constitutional question the federal court of equity was available to it. The state statute forbidding a stay of proceedings until a final judicial decree was rendered, of course, could not prevent a federal court of equity from affording such temporary relief by injunction as the principles of equity procedure required. The conditions set out in the bill, therefore, seem to have made a case ripe for federal relief. *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134; *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43, 48.

But it is urged that such relief is premature because the rates, increase of which was refused, were reasonable, and afforded an adequate return on the value of the property of the company used in the public service as fixed by the Commission in accord with the statutory procedure for that purpose, and that the company still has a right to appeal from the valuation of the Commission to the Superior and Supreme Courts on the legislative question of that valuation.

Section 10441 of the State of Washington (Remington's Comp. Stat., 1922) has elaborate provisions for the fixing

of the value of the property and equipment of a public service company. The company is given thirty days' notice of a hearing and is entitled to adduce evidence and to have it transcribed and certified. The Commission is to render findings of fact in writing concerning all matters concerning which evidence may be introduced tending to show the value of the company's property used for the public convenience. The company believing the findings to be unfair, unwarranted or unjust, may go into the Superior Court and have a writ of review of such findings and their correctness, reasonableness and lawfulness inquired into and determined, and if the court finds them to be "unjust, incorrect, unreasonable, unlawful or not supported by the evidence," it shall make "new and correct findings" unless it sets them aside for refusing to receive proper evidence, and returns them for new findings thereon. The company is given the right of appeal to the Supreme Court of the State which is given the same power as the Superior Court as to the findings of the Commission. The findings of the Commission as corrected by the courts are made admissible in evidence in any action or proceeding except in matters of taxation, and are to be conclusive evidence of the facts found under conditions then existing and can only be controverted by showing a subsequent change of conditions. Provision is made for further hearings to ascertain betterments, improvements, extensions and additions, and the values of the property used by the company for interstate and for intrastate business.

It is clear that the function of the courts in fixing the valuation of the property of the public utility is not confined to a judicial review of the work of the Commission. The courts are made part of the valuation tribunal, pass on the weight of the evidence, and can set aside a valuation and make a new one. *Keller* v. *Potomac Co.*, 261 U. S. 428.

It is thus apparent that the contention of the Department and the state authorities that the company has not exhausted its remedy to secure a change in the valuation of the property by the Superior and Supreme Courts of the State is correct, and that resort to them to change the valuation would be no bar to a resort to a federal court of equity to enjoin the enforcement of rates based upon such valuation after it had been approved by the state courts. It was on this ground that the District Court held both on the application for a temporary injunction before the three judges and upon the final dismissal that the bill was premature, and could not be brought until after the final confirmation of the valuation by the State Supreme Court.

The District Court relied on the case of *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210. In that case, the tribunal which fixed railroad rates that were the subject of controversy consisted not only of a commission but of the Supreme Court of the State on appeal, and the court in reaching its conclusion acted legislatively, as the commission did. It was held that as the complaining company had not exhausted its legislative remedy by appeal to the Supreme Court of the State, for its final action in the fixing of rates, comity, in absence of a controlling right to the contrary, required that the federal court delay remedy by injunction against the rates fixed until the company had invoked the conclusion of the State Supreme Court in respect to them. So here it is contended that until the Superior and Supreme Courts shall have finally considered the correctness of the valuation upon which the adequacy of the rates depends, comity requires that the federal court shall stay its hand.

It is first objected to this view that the constitution of the State of Washington does not authorize its legislature to vest its courts with the legislative power to fix rates, and therefore that, after the Commission had fixed the

valuation, further procedure in fixing valuation was void, and there was no reason either of comity or right which should delay the remedy by a bill in a federal court. *Territory ex rel. Kelly* v. *Stewart*, 1 Wash. 98, 110; *State ex rel. Seattle* v. *Public Service Commission*, 76 Wash. 492, 500. It is our duty to avoid expressing an opinion on such an issue under the constitution of Washington in the absence of a clear decision by its highest court, if we can do so; and we think we can.

In the case before us, the company is shown by the averments of its bill to be suffering daily from confiscation under the rates to which it is now limited. It has done all it could to get relief and can not get it. The rates here in question were in force for more than a year, the company advanced them, the old rates were reinstated by the Department of Public Works. In such a case then there was no chance for a stay. By § 10429 (Remington's Comp. Stat., 1922) the pendency of any writ of review does not of itself stay or suspend the operation of the order of the Commission, but the Superior Court may suspend the order, but no order suspending an order of the Commission relating to rates, etc., can be made unless the court finds that great or irreparable damage would be done to the petitioner, and the section contains the following proviso:

"Provided, however, that when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court by such supreme court."

Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded

will not prevent a federal court of equity from suspending the daily confiscation, if it finds the case to justify it. *Oklahoma Gas Co.* v. *Russell,* 261 U. S. 290, 293. In such a case the *Prentis Case* has no application. *Love* v. *Atchison, etc. Ry. Co.,* 185 Fed. 321, 324, 325.

But it is argued that the courts of Washington have inherent power to grant a supersedeas in such a case and that §§ 10429 and 10424, *supra,* are invalid. As we have declined to look into the validity of the legislative functions with which the Washington state courts are vested in the valuation sections, so we decline to examine the validity of these restraints upon those courts to grant stays in cases of rates. A litigant whose constitutional rights are being invaded and to whom a statute denies a supersedeas in the state tribunals may properly base his application for equitable relief on the effect of the statute and the presumption of its validity, and is not required to establish that the state statute is not invalid under the state constitution. *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, 296, presents an analogous case.

Nor does the provision of § 266 of the Judicial Code (37 Stat. 1013, c. 160), that a suit in a state court to enforce the rate complained of accompanied by a stay, shall suspend the proceedings in the federal court, prevent the filing and prosecution of this bill, first because no such suit seems to have been brought, and, even if it had been, there certainly has been no stay of proceedings in the state court as provided in that section. *Dawson* v. *Kentucky Distilleries Co., supra.*

We think, therefore, that the District Court erred in denying a temporary injunction under § 266 on the ground that the bill was premature.

But it is said that the appeal from the interlocutory decree in No. 540 was merged in the appeal from the final decree in No. 739, and therefore should be dismissed. A motion was made for this purpose. We think that under

Shaffer v. *Carter*, 252 U. S. 37, 44, this motion should be granted; but it does not change the ultimate result, because the final decree of the District Court dismissing the bill really turned on the same erroneous ruling of its prematurity as that upon which the temporary injunction was denied and must be reversed for the same reason.

After the case was reached in this Court, somewhat extended argument was made in the later appeal to show that the bill was defective in stating a case for equitable relief even if it was not premature. The argument is based on objections which seem to us to be rather makeweights or afterthoughts, and are so unsubstantial that we do not discuss them. The merits of the issue between the parties can be developed after the case is remanded to the District Court for further proceedings.

Decree reversed and cause remanded for further proceedings in conformity with this opinion.